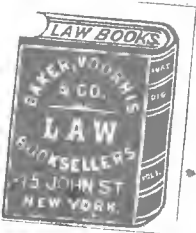


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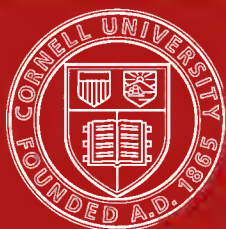
Principles and sources of title to real



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PRINCIPLES AND SOURCES
OF
TITLE TO REAL PROPERTY
AS
BETWEEN THE STATE AND THE INDIVIDUAL
AND
THE RELATIVE RIGHTS OF INDIVIDUALS

How the Individual or State Acquires Title and
How the Individual Secures Compensation

TAX TITLES

RULES, REGULATIONS, PROCEDURE FORMS

BY
ANSON GETMAN

Deputy Attorney General of the State of New York, in charge of the Title Bureau



ALBANY, N. Y.
MATTHEW BENDER AND COMPANY
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1921

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FOREWORD

This work is intended to cover a field, and in a manner, not covered by any other book.

The general principles and sources of title to real property and the relative rights of individuals and corporations therein have been considered and practically applied.

The fundamental principles of title and rules of property constituting the foundation upon which the law of real property is built, as found in the opinions of the courts, have been analyzed and discussed.*

The fact has not been overlooked that a decision may be contrary to principle and likely to be overruled even by the same court, unless it has been so frequently followed as to become a rule of property.

Particular attention has been given to the law and practice governing the acquisition of title from and by the State and the procedure relative to securing compensation from the State. This has become necessary for the following reasons:

1. The State of New York, since its organization in 1777, has been and is still granting lands not granted by colonial patents, the title to which was acquired by the People.
2. In more recent years the State has reacquired title to thousands of parcels of land in connection with the great

* A case in point is *Towle v. Remsen* (70 N. Y. 303). Here may be found:

(a) Application of the doctrine of *res adjudicata* (p. 307) and of *stare decisis* (p. 308).

(b) Distinction between *conditions precedent and subsequent*, as well as rules pertaining thereto (p. 309).

(c) Definitions and illustrations of *conditional limitations* (p. 312).

(d) Conclusion that a *pre-emptive right* is an *equitable claim* to acquire title, not enforceable (p. 316).

(e) What constitutes *adverse possession* (p. 316).

(f) Grants void for *champerty* (p. 318).

(g) Distinction between *conveyances and mortgages* (p. 318).

public projects which it has undertaken and is now carrying on, in particular, the construction of the Barge Canals and terminals. The State has also reacquired title to many parcels of land as a result of tax sales, escheat and foreclosure of mortgages. The State is now reacquiring title, by appropriation or purchase, to thousands of acres of land in at least twelve different counties for State Park purposes.

3. Some of the land so acquired is again being granted or conveyed to individuals and corporations.

4. Under recent legislation the State is reasserting title to a large number of parcels of land under navigable waters, in particular, in the Greater City of New York.

5. In addition, the State has developed waterways and impounded waters for storage and navigation purposes and the question of resultant water rights is becoming of increasing importance.

6. The rights of public service corporations upon State owned lands, as well as the varying kinds of rights, demands greater attention as the activities of the State increase.

Special consideration has been given to lands under navigable waters, unoccupied lands, canal lands, waters, tax titles, searching and examination of titles and procedure in the Court of Claims.

"Principles and Sources of Title to Real Property" is the result of an experience of several years as Deputy in charge of the Title Bureau in the office of the Attorney General of the State of New York. However, any expression of opinion is not to be considered as official but as the personal views of the author. It is submitted with the hope that it will be found to be of use and value to all municipal and public service corporations and to all lawyers having title or real property questions — not only as between the State and the individual but as between individuals.

Albany, N. Y., October 1, 1921.

ANSON GETMAN.

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CODE REFERENCES

AUTHOR'S NOTE

In the year 1877, the "Code of Procedure" was superseded by the "Code of Civil Procedure," commonly referred to as the "Code." Now, after nearly half a century and on this first day of October, 1921, the latter has been superseded and sections thereof have been distributed and may be found *largely* in the following:

Civil Practice Act.
Surrogate Court Act.
Court of Claims Act.
Real Property Law.
Public Lands Law.
Condemnation Law.
Rules of Civil Practice.

These "Code" sections have been referred to, considered and construed by the Courts and every lawyer reading these decisions will be obliged to refer to the "Code" as in the past, and to ascertain where such sections may now be found and in what respect they have been modified, changed or amended. For that reason, the original "Code" sections have been used and the following "Distribution Table" has been prepared.

TABLE SHOWING HOW SECTIONS OF THE CODE OF CIVIL
PROCEDURE, CITED HEREIN, HAVE BEEN DISTRIBUTED,
AND WHERE SAME MAY NOW BE FOUND.

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3358	98, 377	Condemnation Law.	2

PRINCIPLES OF TITLE TO LANDS AND WATERS.

PART ONE.

Original and Present Holdings — Generally.

- Chap. I. When State Government was Organized.
II. Forfeiture.
III. Legislative Grants.
IV. Commissioners of the Land Office.
V. Present Holdings.
VI. State Law.
VII. Public Records.

CHAPTER I.

When State Government Was Organized.

Decisions of General Importance.

- A. Lands in Western New York.
B. Hudson, Mohawk and Other Rivers.

ORGANIZATION OF STATE GOVERNMENT.

The origin of the State Government of the State of New York was the 20th day of April, 1777.¹ This was twelve years before the Constitution of the United States went into operation on the first Wednesday of March, 1789.

1. Jackson v. White, 20 Johns. 313.

The People of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State.²

No purchase or contract for the sale of lands in this State, made with the Indians since the 14th day of October, 1775, shall be valid unless made under the authority and with the consent of the Legislature.³

All grants of land within this State made by the King of Great Britain, or persons acting under his authority, after the 14th day of October, 1775, shall be null and void; grants of land within the State made by the authority of the said King, or his predecessors, before that day are generally valid.⁴

Section 4 of the Public Lands Law provides that the title to all lands which belonged to the crown of Great Britain on the 9th day of July, 1776, vested in the People of this State on that day.

It is not the purpose of this work to specify the tracts and parcels of land to which the People of this State, on the 9th day of July, 1776, acquired title. It is sufficient to assert that many large tracts of land in all parts of the State had not then been granted, and that the People of this State acquired title thereto. A big part of the State had not been granted under colonial patents. Conflicting claims were made to the western part of the State now located in about twelve counties.

The question has frequently arisen as to whether the People of the State of New York took title to a particular tract or parcel of land or whether same had been previously granted. This is especially true as to lands under navigable waters. The descriptions in early patents are often difficult to interpret and it is not always possible to determine with certainty that it was intended to exclude or include lands under water. The title in the People of the State here mentioned is the sovereign title as distinguished from the governmental control through the Legislature, for the use of the public.

2. Art. I, § 10, State Constitution.

3. Art. I, § 15, State Constitution.

4. Art. I, § 17, State Constitution.

Decisions of General Importance.**A. LANDS IN WESTERN NEW YORK.**

An opinion which reviewed many of the holdings of the courts to the year 1883 was written in that year by Chief Judge Ruger, of the Court of Appeals, in *Smith v. City of Rochester*, 92 N. Y. 463. It appears that at some time prior to 1786 a dispute arose between the States of Massachusetts and New York as to the ownership of a large tract of land in the western part of the State of New York in which Hemlock Lake is located. The differences were finally adjusted by a treaty by which the State of New York ceded to the Commonwealth of Massachusetts the title to the lands involved, but excepted certain specified governmental and also sovereign rights. Thereafter, the Commonwealth granted these lands to individuals. The respective rights of the grantees from the Commonwealth of Massachusetts and the State of New York were considered by Judge Ruger, after an exhaustive presentation of the conflicting contentions. The opinion is especially enlightening and discusses the dual rights or interests of the State — one governmental; the other proprietary. It was decided that certain lands are held, controlled and regulated by the State government as a mere trustee for the use of the public, such as public highways and navigable rivers; that as to other lands the domain of the State is the same and the State has the same absolute property right as an individual. Although an individual may own the soil beneath the water, the State government has the right to regulate and control the waters of the navigable lakes or streams for the benefit of the public, regardless of this individual ownership of the soil beneath the water.

The question as to the relative rights of the States of Massachusetts and New York as affecting the claims of individuals to lands in the western part of the State, has been and still is a live one, especially with respect to lands under navigable waters. It recently arose in Monroe County when the City of Rochester sought to take lands formerly under the waters of Lake Ontario for city park purposes. It was contended by the city that Massachusetts

owned these lands. On the contrary it was claimed that title never passed to Massachusetts. The following decisions bear upon the respective contentions:

Massachusetts granted some of these lands to Phelps and Gorham. In the early case of *Starr v. Child* (5 Denio, 599, 615), the statement was made in a dissenting opinion that under this grant, Phelps and Gorham took title to the bed of the Genesee River.

The ownership of so much of the bed of Seneca Lake as is within the area granted by the State of New York to the State of Massachusetts, was involved in *City of Geneva v. Henson* (121 A. D. 893, reversed 195 N. Y. 447).

The referee found that under the treaty between New York and Massachusetts, New York conveyed to Massachusetts lands under Seneca Lake from the western shore of the lake eastwardly to the so-called pre-emption line.

The Appellate Division affirmed; the Court of Appeals reversed and remitted the matter to the Supreme Court for further proceedings, stating it did not feel compelled or even permitted to consider the question.

The case is reported again in 140 A. D. 49; 124 N. Y. Supp. 588. To quote from the opinion:

"It is the claim of the appellant that the waters of Seneca lake, west of the boundary line referred to, passed by indefeasible title to the State of Massachusetts. As already indicated, Seneca lake was a navigable body of water and it has been used from the time of this treaty and before until the present time by such boats, ships and craft as have plied the waters of the larger fresh water lakes in this State and the nation. We, therefore, start with the established fact that the lake has always been actually navigable, and in the construction of this grant to the State of Massachusetts it is important to keep this fact in mind. In a navigable body of water it is very difficult to distinguish the sovereignty or governmental control of the State from ownership in the land covered by the water. The manifest idea which always occurs in the consideration of a navigable body of water is that its primary purpose and its great value pertain to it because of its navigability. It is hardly credible, therefore,

that the State will part title with the bed of a navigable body of water where it retains sovereignty over it, unless the language most explicitly indicates that such was the purpose.

"Again, the sovereign grantor in conveying a body of water of this character would hardly be expected to retain the fee of the land under the water when it parts with its sovereignty and control over the waters which compose the lake. Consequently it has become a principle in construing a grant of this kind that before it will be made effective to transfer the title by one State to another of a body of water which is indisputably navigable it requires express language in the grant to make it effective. * * *

"It will be noted that the easterly boundary of the territory ceded and conveyed to the State of Massachusetts extended far into the waters of Lake Ontario, and the northerly line was in this lake.

"Again, it does not seem possible that the State of New York, still retaining its sovereignty over this great lake, would absolutely convey to the State of Massachusetts the land upon which the waters of the lake rest. It was a general principle of the common law that the State owned the bed of all waters actually navigable which are within its boundaries, unless expressly conveyed. * * *

"In construing the effect of a grant of this kind it is important to note the authority exercised by the contracting sovereign power over its navigable waters. The colony of Massachusetts early in its history * * * asserted its sovereign power and title over all rivers within its domains so far as the sea ebbs and flows, and that was the test of navigability in that colony as applied to running water. And the title to all beds of lakes and ponds with an area of more than ten acres was also vested in the State, and this early statute has been inflexibly adhered to by the courts of that Commonwealth."

Reference is also made to the many acts passed by the Legislature relative to the lands in question and to the use of the lands by the State for canal purposes. It was pointed out that for nearly a century the State of New York has constantly assumed

acts of ownership; that there has been no claim of title by the successors of the Massachusetts ownership.

Another appeal was taken to the Court of Appeals (202 N. Y. 545), which affirmed the Appellate Division, but stated:

“We do not deem it necessary to now construe the treaty of Hartford and determine the question as to whether or not the lands under the waters of Seneca lake passed to the State of Massachusetts.”

The ownership of the bed of Lake Ontario was also involved in *People ex rel. Burnham v. Jones* (112 N. Y. 597).

B. HUDSON, MOHAWK AND OTHER RIVERS.

The early decisions which have been reviewed by the courts in recent years, held that the Hudson and Mohawk Rivers were public navigable streams; that title to the bed thereof had not been granted and was in the People of the State. Without a detailed discussion of the earliest decisions, reference is made to an elaborate and scholarly consideration of the subject reported in 33 New York, at page 461, *People v. Canal Appraisers*. The issues before the court involved land and water rights near the present city of Little Falls, Herkimer County, but the opinion was far reaching in its effect. Here may be found a review not only of the decisions of the courts of this State to the year 1865, but of many other States. Reference is made to the Genesee, Saranac, Solomon, Susquehanna, Delaware and other rivers and streams and to decisions affecting the title thereto.

When the course of the Mohawk River within the city of Utica was changed prior to 1907, land formerly under the waters thereof was made dry and became useful and valuable. An individual claimed title thereto under a patent granted by King George the Second in 1734. This resulted in an action to which the State was not a party, but the opinion of the Court of Appeals⁵ is of importance as construing the grant in question and determining the title which passed thereby. It was held that title to the bed of the Mohawk River at that point passed under the patent con-

5. *Williams v. City of Utica*, 217 N. Y. 162.

strued, and vested in the patentee subject to public rights and uses, such as the right of the public to navigate the river. The land covered by the waters of the river was included in the description in the patent.

Prior to the decision in the Williams case, it had frequently been held by the courts that the title to the bed of the Mohawk River generally remained in the People. These conclusions were the result of two theories. One theory was that the Dutch Government in making grants excepted title to the bed of the Mohawk River and that title to the bed of the Mohawk River passed to Great Britain and later to the State of New York. The other theory followed the rule of the English common law; under it where a river was actually navigable it was subservient to the use of the public; a conveyance bounded by such navigable river would not include any part of the river or the lands under the same, as distinguished from the rule applicable to non-navigable streams.

The court in the Williams case followed neither of these theories and held that the sovereign might convey the title to the bed of a navigable stream, subject to public rights and uses. In doing this the court construed the wording of the description contained in the patent involved. It held that the description covered a large tract of land and all of the land within the boundaries thereof; that incidentally this land was crossed by the Mohawk River; that there was no intention to exclude the lands under the river and convey only the lands lying on either side thereof.

In *Haselo* against the State of New York,⁶ the patent under consideration was made in 1684. The State contended that the description did not include certain lands near the city of Schenectady, including the bed of the Mohawk River and the islands therein for a distance of several miles. The court construed the patent as including the Mohawk River and that the State of New York had no title to the lands thereunder within the limits of the description contained in the patent. This decision is of importance as bearing on the ownership of many islands near the city of Schenectady.

In *Danes* against the State of New York,⁷ the court construed

6. 187 A. D. 804; 175 N. Y. Supp. 850.

7. 219 N. Y. 67.

a grant or patent from Queen Ann in 1708. Title to certain lands under the bed of the Mohawk River, near the city of Schenectady was involved. These lands are not far distant from those affected by the decision in the Haselo case. The lands involved in the Williams and Haselo cases were located on both sides of the Mohawk River. The lands involved in the Danes case were located on one side of the Mohawk River and the particular question before the court was whether the title of the claimant, the upland owner, extended to the center of the Mohawk River. The court held that it did not; that the claimant did not own the bed of the Mohawk River in front of his adjacent upland; that title was in the State of New York.

West Virginia Pulp and Paper Co. v. Duncan W. Peck, Superintendent of Public Works of the State of New York,⁸ construed patents containing descriptions in many respects similar to that referred to in the Haselo case. The descriptions found in grants made in 1684, 1698 and 1708 are held to exclude the bed of the Hudson River at Mechanicville, Saratoga County. Reference is made to an earlier opinion in the same action,⁹ in which appears the statement that no case has been found which determines that the title to the bed of the Hudson River north of its junction with the Mohawk River, is in the riparian owners. Title is held to be in the State. The Appellate Division, Third Department, affirmed unanimously.¹⁰

The title to the land under a portion of Wood Creek in Washington County was involved in Champlain Stone & Sand Co. v. State,¹¹ and it was held that Wood Creek is a public highway; that in and by the "Artillery Patent" of 1764 the fee to the bed of Wood Creek was excepted and thereafter vested in the State of New York. The title to the bed of Wood Creek as it crossed lands embraced in another patent granted in 1765 was before the court in Johnson v. State.¹² It was held that upon the formation of our State government, title vested in the State and that the stream was

8. 104 Misc. 172; 171 N. Y. Supp. 1065; af. 189 A. D. 286; 178 N. Y. Supp. 663.

9. 82 Misc. 72; 143 N. Y. Supp. 720.

10. 189 A. D. 286; 178 N. Y. Supp. 663.

11. 142 A. D. 94; 127 N. Y. Supp. 131; af. 205 N. Y. 539.

12. 151 A. D. 361; 135 N. Y. Supp. 496.

a common highway for the benefit of the public. The title to the bed of this creek was again considered in *Whitehall Co. v. Atlantic Co.*,¹³ and the same conclusion reached.

From the foregoing decisions and the authorities therein cited, some conclusions may be reached as follows:

1. That if a Colonial patent by its terms specifically described and included lands under the Mohawk or Hudson Rivers, title to same passed to the patentee.

2. That if the language of the patent is indefinite and uncertain and may include or exclude these rivers, a decision by the courts may be necessary for the purpose of construing same.

3. That even though the title passed to an individual under a Colonial patent and even though the State has no title to lands under the Mohawk or Hudson Rivers at a particular point, the State has a governmental function as trustee for the public, and may improve navigation, and the public may navigate these rivers.

4. That a Colonial patent of lands on one side of the Mohawk or Hudson Rivers will not carry title to the center thereof unless specifically included. This is the converse of the rule as applied to other rivers as well as lakes.

5. That even though the adjacent upland owner on one side of one of these rivers may not own the lands beneath same, title to such lands is not of necessity in the State of New York, but might have passed under some other Colonial grant, specifically including same.

6. "Title to land under a navigable river is not the same as the title to the shore land. In a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed. The title to the upland is absolute and paramount, while the title to the lands over which the navigable water flows is subordinate to the public right of navigation.

13. 160 A. D. 208; 145 N. Y. Supp. 567; af. 221 N. Y. 42.

“The rights of the * * * owner of the fee of land on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river.” ¹⁴

The question of the relative rights of the individual and the State is becoming of greater importance and is arising more frequently as this character of land and the water powers incident thereto become more valuable.

14. Matter of Pub. Serv. Com., 224 N. Y. 211.

CHAPTER II.

Forfeiture.

The first session of the Senate and Assembly of the State of New York began on the 10th day of September, 1777, and continued to the last day of June, 1778.

On the 22nd day of October, 1779, an act was passed for the forfeiture and sale of the estates of persons who had adhered to the enemies of this State. Under this act,¹ the People of this State became vested with the title to many tracts of land previously granted. Commissioners of Forfeitures were created with authority to sell and dispose of all real estate forfeited to the People of this State, at public vendue, to the highest bidder.²

1. Chap. 25, Laws of 1779.

2. Johnson v. State, 151 A. D. 361; 135 N. Y. Supp. 496.

Whitehall Co. v. Atlantic Co., 160 A. D. 208; 145 N. Y. Supp. 567; af. 221 N. Y. 42.

CHAPTER III.

Legislative Grants.

As to all land to which the People of the State of New York took title, the *source* of the title of the individual is a grant from the Legislature or a commission or officer, authorized by the Legislature to make a grant.

In the first instance all of the people of the State owned all of the ungranted lands in common and could enjoy same in common, but the people soon created a governmental body — a Legislature — and empowered it to parcel out to individuals, tracts of land for a consideration or on condition that the patentees do certain specified things for the common good of all the people.

Prior to 1784 the Legislature granted lands directly. As an illustration, a grant of 2,000 acres to an individual was provided for by Chapter 26 of the Laws of 1783.

CHAPTER IV.

Commissioners of the Land Office.*

On May 10, 1784, the Legislature passed Chapter 60 of the Laws of that year. By it, commissioners were created and appointed to lay out and grant unappropriated lands within the State.

The commissioners were authorized to prepare maps, and to subdivide the unappropriated lands into townships of six miles square, each township to contain not more than 23,040 acres.

This act was repealed by Chapter 67 of the Laws of 1786, which provided a more specific method of procedure "for the speedy sale of the unappropriated lands within this State and for other purposes therein mentioned."

The importance of these early acts at this time must be taken into consideration in determining the ownership of lands granted pursuant thereto, in the event that such lands are not actually and adversely occupied. The courts have frequently held that in order to determine ownership to so-called wild, vacant or forest lands, there must be a continuous chain of title from the original patentee to the person presently claiming title. A deed from a person not in possession, or not shown to be the owner, establishes no title. The possession must be actual and there must be more than an occasional entry.¹

Chapter 50 of the Laws of 1909, being Chapter 46 of the Consolidated Laws, is now known as the "Public Lands Law." It provides for Commissioners of the Land Office and the powers and duties of such commissioners. The Commissioners of the Land Office are but the agents of the Legislature, having only the powers conferred by the Legislature.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6750.

1. Miller v. L. I. R. R. Co., 71 N. Y. 380.

Greenleaf v. B. F. & C. I. R. Co., 141 N. Y. 395.

Sheridan v. Cardwell, 141 A. D. 854; 126 N. Y. Supp. 781.

Judd v. Chilson, 177 A. D. 121; 163 N. Y. Supp. 695.

The Commissioners of the Land Office may lease for a term, not exceeding one year, State lands not appropriated to any immediate use and may grant title to lands by letters patent. The Commissioners of the Land Office may grant:

1. Unappropriated State lands:

(*Section 30, Public Lands Law.*)

(a) State lands belonging to the common school fund;

(b) All escheated lands (see also § 60, P. L. L.);

(c) Lands conveyed to the State for the benefit of the canal fund;

(d) Lands purchased by the State on foreclosure of mortgages given on loan of United States deposit funds or loan of money for the State;

(e) State lands lying within the limits of a city or village not devoted to a public use;

(f) All other lands belonging to the state not directed by law to be kept for or applied to any specific purpose, except lands under water and salt springs lands.

2. Abandoned canal lands.

(*Section 50, Public Lands Law.*)

3. Lands under water.

(*Section 75, Public Lands Law.*)

CHAPTER V.

Present Holdings.

- First. Generally.
- Second. Exceptions and Reservations.
 - A. Highways.
 - B. Navigable Streams.
- Third. By Possession — Adverse.
- Fourth. By Accretion.
- Fifth. Summary.
- Sixth. State, Municipal and Private Rights.

First. Generally.

Comparatively little of the land to which the People of the State of New York took title on the 9th day of July 1776, is still vested in the People of this State. It has mostly been granted, excepting that much land under navigable waters remains ungranted.

The State has, however, re-acquired title to millions of acres of land previously granted by the Commissioners of the Land Office or others having authority so to do, or held under grants made prior to the organization of the State government.

Whether a certain tract or parcel of land has been granted by the State generally involves the construction of the description contained in the particular grant under which the land is claimed. The question also arises as to whether a fee title to the entire tract described was granted, or whether the fee to a portion thereof was excepted or an easement reserved as to part.

Second. Exceptions and Reservations.

Attention is directed to Chapter 67 of the Laws of 1786 under which many of the early grants of large tracts of land were made. This act provided in general as follows:

- (a) That the Surveyor General should survey the outlines of all waste and unappropriated lands or lay down on

a map any tract of land for sale without surveying the outlines;

(b) That said lands should be subdivided into townships containing as nearly as may be 64,000 acres and as nearly in squares as local circumstances will permit;

(c) That each township shall be subdivided into lots as nearly square as may be, each lot to contain 640 acres or as nearly so as may be;

(d) One copy of the map shall be filed in the office of the Secretary of State and the original in the office of the Surveyor General;

(e) The Surveyor General is directed to give notice by advertisement that said lands would be sold at public vendue to the highest bidder on a stated day;

(f) That every such sale shall be "with a reservation of five acres of every hundred acres so sold, for highways";

(g) That in every township so laid out the Surveyor General shall mark one lot on the map as follows:—

"Gospel and Schools" and one

"For Promoting Literature"

which lots shall be near the center of every township and which shall not be sold;

(h) That the Commissioners of the Land Office may grant lands under navigable rivers;

(i) That all letters patent "shall contain an exception and reservation to the People of this State of all gold and silver mines and shall vest the lands in fee simple."

The act contained numerous special provisions which might affect titles in certain localities.

It is to be noted in particular that:—

All letters patent "shall vest the land in fee simple."

All letters patent shall contain "an exception and reservation of all gold and silver mines."

All sales shall be "with a reservation of five acres of every hundred acres so sold, for highways."

A. HIGHWAYS.*

The question as to whether the State excepted a fee or reserved an easement of 5 acres of every 100 acres described does not seem to have been definitely decided by the courts. It is one of great importance in localities which have not been improved.

An opinion by Attorney General Merton E. Lewis, dated July 29, 1918, is to the effect that the State did not except a fee but reserved an easement only for highway purposes; that under such a reservation the state might today lay out highways in certain instances without liability, and that the State in re-acquiring such lands need not pay for lands embraced within existing or contemplated highways.¹

B. NAVIGABLE STREAMS.†

A grant by the State in 1793 involving title to a portion of the lands under the Oswego River was construed by the Court of Appeals in *Fulton Light, Heat & Power Co. v. State* (200 N. Y. 400). It was held that the State did not own the portion of the bed of the Oswego River, title to which was in question; that it was granted in 1793 by letters patent; that the description contained in such letters embraced a portion of the river; that notwithstanding such ownership the public right of passage and transportation existed; that the river was not exclusively owned by the riparian owner, on the theory that to be so owned it must in fact be too small to be navigable.

This decision and the cases therein referred to and the principles therein set forth may be of great assistance where a question arises as to the ownership of a particular piece of land now or formerly under water. The distinction between tidal, navigable and non-navigable streams is fully considered; also the English common law rule applicable thereto and the effect thereof in this country. Although title was held to be not in the State, the

* See Weed's Practical Real Estate Law, p. 1018.

1. The opinion of the Attorney-General may be found in full—see "Appendix I."

But see *Matter of Com. of Public Works*, 135 A. D. 561, 73; 120 N. Y. Supp. 930.

† See Weed's Practical Real Estate Law, p. 1222.

right of the State to make improvements in the river channel for the purpose of facilitating transportation was conceded. The distinction between *title* and such *right* should always be carefully drawn. This right of the public to use streams for purposes of travel involves a question of fact to be determined by the size and availability of the stream for navigation purposes and should never be confused with the title or ownership of the underlying soil.

The ownership of lands now or formerly under the bed of the Onondaga Creek which flows through the city of Syracuse has been considered at different times. Grants of lands have not generally included same, although a portion thereof has been granted. The course of the stream has been changed in part — a new channel has been made and the old channel filled. Buildings have been erected and streets have been laid out where once this creek flowed, without any grant from the State. In the early part of 1919 the Attorney General caused an examination to be made with reference thereto. There is on file in the office of the Attorney General a rather exhaustive report covering portions of the Onondaga Creek. The conclusion is reached that certain portions of the creek have not been included in any grant made by the State and are still owned by the State. It appears that the creek has been navigated from time to time.

Third. Possession — Adverse.*

The scope of this work will not permit of a reference to a large number of decisions which have fixed title to separate tracts or parcels of land. All of the present holdings of the State have not been adjudicated. State officials have not at all times prevented the occupation of State lands by individuals. Individual occupation is not always conclusive that the State does not own the lands so occupied. As the State has entered upon great public improvements differences have arisen between the State officials and occupants of lands required for such improvements, as to the

* See Chaps. VIII, Third, and XXVI, Seventh, B.; also

NOTE, N. Y. Ct. of App., Bender Anno. Ed., Bk. 21, p. 550.

Weed's Practical Real Estate Law, p. 53.

Wood on Limitations (4th Ed.), pp. 7, 12, 18.

ownership of same and as to the respective rights in and to same.

Recent statutes have made it incumbent on these officials to recover possession of ungranted lands and many persons are realizing that they do not own land which they have been occupying or vacant land which they assumed they owned. Prospective purchasers are more cautious about accepting deeds without any examination of title or after making only a cursory search in a county clerk's office. It is rather the exception than the rule to find letters patent recorded in county clerks' or registers' offices. These are recorded in the office of the Secretary of State. Other records of vital importance may be found in the office of the State Engineer and Surveyor and the State Comptroller.

Although a continuous possession of lands under certain circumstances for twenty years may give a right to possession in the future for all time as against all but the possessor, this is not true as against the State. Section 362 of the Code of Civil Procedure (now section 31 of the Civil Practice Act), reads as follows:

"Sec. 362. When the people will not sue.

The people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either,

1. The cause of action accrued within forty years before the action is commenced; or,
2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time."

Early in the State's history the Legislature passed statutes limiting the bringing of actions on account of the occupation of State land. Chap. 43 of the Laws of 1788 and Chap. 183 of the Laws of 1801 contained such limitations. These acts purported to transfer title to an occupant under certain circumstances after 40 years' occupation. Franchises were excepted from their operation. They were later repealed. The present law has been in effect in substantially the same form since 1828. Between that year and 1848 the period of limitation was 20 years. The period was extended to 40 years by Section 75 of the Code of Procedure.

The present code section and the earlier acts mentioned have commanded the attention of the courts, which have generally been loath to hold that mere lapse of time will furnish a defence to an encroachment on State owned land. One of the later decisions which reviews some of the earlier cases involving the question is *Fulton Light, Heat & Power Co. v. State* (200 N. Y. 400). Judge Gray expressed the view that the title of the claimants as against the State was as well supported by the adverse character of the possession as by the record title. Chief Judge Cullen and Judge Bartlett were of the opinion "that, as against the state, no title to the river could be obtained through private use or occupancy, whether adverse or by permission, however long continued, or by prescriptive right."²

Whether an individual with a long continued possession of ungranted lands secures the right as against the State by adverse possession to continue in occupation was considered by the Court of Appeals in *People v. Arnold* (4 N. Y. 508), and *People v. Trinity Church* (22 N. Y. 44).

The Court of Appeals in 1875 reviewed the authorities upon the subject of prescriptive rights as against the State in *Burbank v. Fay* (65 N. Y. 57). It was pointed out that the theory of prescription depends upon a supposed grant and that no grant can be presumed where it would be unlawful or contrary to law; that where an express grant cannot be allowed, a prescriptive right cannot be created; that if this theory should not be followed, the State might be deprived of valuable property and important rights through the fraud, carelessness or inaction of public officials; that no individual can make a valid encroachment upon the public rights; that an individual cannot enclose public lands and gain title to it by long continued adverse usage and possession.

The theory that prescription depends upon a supposed grant and that no grant can be presumed — therefore no title can be created by prescription — where a grant would be unlawful or contrary to law, was also expressed in *Slingerland v. I. C. Co.* (169 N. Y. 60, 72).

In *Matter of City of New York* (217 N. Y. 1) at page 13, may be found the conclusion: "If the city had the power

2. See *Miller v. State*, 223 N. Y. 690.

to make such a grant then the title might be acquired by prescription."

A recent decision of the Court of Appeals³ distinguishes the case reported in 217 N. Y. 1, and holds that title cannot be acquired to wharves and piers by adverse possession since 1880, as against the City of New York, for the reason that they are inalienable.

Unless canal lands have been formally abandoned by the Legislature or by resolution of the Canal Board the State Constitution forbids a sale thereof. The Commissioners of the Land Office have no power to make a grant of such lands. Therefore, title to such lands may not be acquired by prescription.

The State Constitution likewise forbids the sale of lands of the State constituting the forest preserve (Art. VII, § 7). A grant of same cannot be presumed and title thereto cannot be acquired by adverse possession.⁴

The same holds true as to lands under the navigable waters of the State which are common to all and the title to which the State holds in trust for the People. As to any of such lands which cannot be conveyed and as to which the State cannot give title to an individual exclusive as to the State and the Public, no title can arise by prescription and exclusive adverse user by an individual no matter how long continued.⁵

The force and effect of Section 362 of the Code was considered in *Hamlin v. People*.⁶ The court stated as follows:

"Before the State is barred from bringing its action, it must be made to appear that its cause of action did not accrue within forty years and that the people have received no rents or profits within that same period. Failure of proof upon the affirmative of either proposition is not sufficient. There must be proof that neither contingency has occurred.

It has been held, under similar circumstances, that while perhaps the strict doctrine of adverse possession is not to be applied as against the sovereign state, yet that, under this section, where it is sought to establish title against the State,

3. *Matter of City of N. Y.*, 228 N. Y. 140.

4. *People v. Baldwin*, 113 Misc. 172; af. 197 A. D. 285.

5. *Slingerland v. I. C. Co.*, 169 N. Y. 60, 72.

6. 155 A. D. 680; 140 N. Y. Supp. 643.

proof must be made of an adverse, hostile, notorious and continuous possession in the claimant for a period of forty years, as otherwise the presumption obtains that the State has received rents or profits or has been in possession within the forty-year period."

It is therefore not enough to show continuous possession; there must be proof that no rents have been paid to the People and that the People have received no profits.

In *People v. D. & H. Co.* (75 Misc. 322, 135 N. Y. Supp. 339) it was held that a navigable stream is a public highway in which all the People of the State have an interest, and that in the absence of a provision making the State subject to a statute of limitations, no title by adverse possession could be acquired against it; that the defendant had not obtained a prescriptive right to maintain a bridge over a navigable stream and that the defendant did not have the right to impair the navigation of the stream. The Appellate Division, 154 A. D. 909; 139 N. Y. Supp. 392, modified the judgment.

The Court of Appeals (213 N. Y. 194) further modified the judgment and held that as the general control of navigable waters is vested in the State, the consent to bridge such waters should come from the Legislature unless the Legislature had delegated its power to give such authority.

Reference to this subject is not with a view of casting suspicion upon the title or right of any one to occupy lands now being possessed by him, but simply to point out the fact that if the lands have not been granted prior to the creation of the State Government, or thereafter by the Legislature or by the Commissioners of the Land Office, or other board or officer authorized by the Legislature so to do, such occupation as against the State may be unlawful. The same is true as to land, the title to which has been acquired by the State since the origin of the State Government, and which has not been granted, but which is being occupied by an individual.

It has developed, more particularly in recent years, that there are thousands of parcels of State owned lands now or formerly under water, or adjacent to the several canals throughout the State, which are being occupied by individuals. Lands under water

have been filled in or built upon; possession has been taken of islands; lands within the bounds of the several canals have been built upon or enclosed and cultivated. This condition exists along the line of the Erie Canal from Buffalo to the Hudson River; also along the line of the Champlain, Oswego, Cayuga, Seneca and other canals, especially in the cities and villages. The question presents itself as to whether the People of the State of New York have lost title to such lands because some individual has occupied same, without any grant and without compensating the People, for a period of more than forty years.

There are in the City of New York parcels of land now being occupied by individuals without a grant from the state. In 1912, the State took possession of one of these parcels for a Barge Canal Terminal. The land was located at the junction of the East River and Newtown Creek. A claim was filed with the Court of Claims by an individual claiming title thereto. The Court of Appeals in *People ex rel. Palmer vs. Eugene M. Travis*, as Comptroller of the State of New York (223 N. Y. 150, 67), held that the claimant "must prove his title as against the State."⁷

Fourth. By Accretion.*

If an island forms upon lands submerged, it belongs to the original owner. If such formation is created and located in tide waters outside of the boundaries of property which has been granted to an individual, it belongs to the sovereign People. Any land, formed by accretion along the shores of an island or along the shores of any land owned by the People of the State, becomes the property of the People.⁸

Fifth. Summary.

To summarize the State holdings, in general, the following conclusions develop:

1. The People of the State of New York as sovereign hold the absolute and proprietary title to many tracts and parcels of land, and the Legislature may convey the same.

7. See *Clarke Est. v. City of N. Y.*, 165 A. D. 873; 151 N. Y. Supp. 714.

* See *Weed's Practical Real Estate Law*, p. 3; also

NORM, N. Y. Ct. of App. Rep., *Bender Ann. Ed.*, Bk. 20, p. 936.

8. *Mulry v. Norton*, 100 N. Y. 424.

2. As to other lands, the People of the State of New York hold title and the Legislature in a governmental capacity controls same for the use of the public. It may convey same, with certain limitations.

3. If lands, title to which is vested in an individual, are crossed by a stream of water navigable in fact, the people at large have the right to navigate such waters in their natural state, and the State of New York, in its governmental capacity, has the right to improve navigation by deepening the channel, without liability to the individual owner.

4. A stream may be navigable in fact or in law. It may be navigable in law when so declared by the Legislature, although not navigable in fact; or it may be navigable in law, if navigable in fact, and so found by the courts.

5. Before any lands under a stream have been granted by the State, and while the State still holds absolute and proprietary title thereto, such stream, although not navigable in fact, may be declared navigable by the Legislature and thereupon becomes navigable in law. Thereafter, the patentee of such lands takes title to same subject to the right of the public to navigate the waters in their natural state or the right of the State Government to improve navigation without liability.

6. If the State has granted lands crossed by a stream which has not been declared navigable by the Legislature, and which is not navigable in fact, the State has parted with all of its title and all of its right and jurisdiction over such stream, and the patentee is entitled to the sole use thereof, to the exclusion of the public from such stream. This exclusive right or usage cannot be taken away from an individual without compensation. A declaration by the Legislature that the stream is navigable, although not navigable in fact, cannot change its character and create a public highway unless the individual shall have an opportunity to secure compensation.⁹

7. The Mohawk and Hudson Rivers are navigable in law if not wholly navigable in fact. The courts have found them generally navigable in fact.

9. *Morgan v. King*, 35 N. Y. 454.

Chenango Bridge Co. v. Paige, 83 N. Y. 178.

8. The Legislature has declared certain rivers to be navigable in law. The Genesee River was so declared by Chapter 2 of the Laws of 1798 (22nd Session), re-enacted by Chapter 186, Laws of 1801.¹⁰ This act also declared many streams public highways, including, among others, the outlets of Canadarqua, Seneca, Otsego, Cayuga, Owasco, Skaneateles and Salt Lakes.¹¹

9. The right of the public to navigate the waters of navigable lakes does not exist where the lake is located wholly upon a tract of land, title to which is in one person, unless there is a stream entering into or discharging from such lake, which stream or streams is or are navigable.

Where the public has the right to enter upon or leave navigable lakes, rivers or streams over a *public highway, either water or land*, without trespassing upon private property, the public may navigate the waters of such navigable lakes, rivers or streams.

10. A stream may be navigable in fact for purposes of transporting boats of various types and sizes, or it may be navigable for the purpose of carrying logs, although not navigable by boats, or it may be navigable by boats in parts, capable of carrying logs in parts, or at times only, and not subject to any public uses at other points or times.

In considering the navigability of the Raquette River in the northern part of the State, the court, in *Morgan v. King* (35 N. Y. 454), discussed these features at length, as well as the rights of the upland owner.¹²

Sixth. State, Municipal and Private Rights.

On the origin of the State, the People of the State in a *sovereign* capacity owned all ungranted lands and could use same collectively. Their representatives in the Legislature could and did provide for the subdivision and disposition of such lands, giving to certain

10. *Powell v. City of Rochester*, 93 Misc. 227; 157 N. Y. Supp. 109.

11. *C. B. Co. v. Paige*, 83 N. Y. 178.

Brewster v. Rogers, 169 N. Y. 73.

12. See *C. B. Co. v. Paige*, 83 N. Y. 178.

Slingerland v. I. C. Co., 169 N. Y. 73.

of such people, on conditions imposed or on payment of a sum of money for the benefit of all, the exclusive right to use, occupy and enjoy a particular parcel, subject to the payment of an annual tax for the cost of maintaining the government. The people to whom said parcels of land were set aside and granted by letters patent thereupon became the owners in a *proprietary* sense.

The State also created corporations including municipalities and granted to them the power to acquire lands already granted to individuals. By payment from its corporate funds contributed by the residents and land owners of the municipality, such municipality could acquire lands for its corporate purposes and would own same in a *proprietary* sense.¹³ It could also acquire other lands for general public purposes, such as street purposes, paying for same from assessments against other lands benefited by the public improvement, but lands so acquired are not *owned* in a proprietary sense but *held* in a *governmental* capacity as trustee.

As to ungranted lands owned by the sovereign People, same are controlled by the State Government and held by it in a *governmental* capacity.

13. Matter of R. T. R. R. Com., 197 N. Y. 81.

Ogden v. New York, 141 A. D. 578; 126 N. Y. Supp. 139.

CHAPTER VI.

State Law.*

First. State Boundaries.

Second. Cessions to United States.

First. State Boundaries.

The boundaries of the State of New York and between the State and other States and the Dominion of Canada have been agreed upon and located, and the boundary lines are described in the "State Law," Chapter 59 of the Laws of 1909. The lines described are between the State of New York and Connecticut, Massachusetts, Vermont, Pennsylvania, New Jersey and Canada.

It is in some instances provided that the location of such lines shall not affect any existing titles to property under grants previously made by either of said States, and shall not affect existing rights of said States or the citizens thereof under grants, letters patent or prescription.

Second. Cessions to United States.

The State, by Article III of the State Law, has ceded certain lands to the United States, some without reservations, and others with reservations; it has also authorized the United States to acquire other lands as therein set forth. There are so many parcels involved that an enumeration of same is justified, not only to show what the State has disposed of, or authorized the acquisition of by the United States, but for the information of those dealing with such lands and the lands which bound same. Specific descriptions are omitted as indicated. A reference to the act will supply same.

See "Appendix II" for a list of such lands as described in Sections 20 to 55, inclusive, of the State Law.

* See B. C. & G. Anno. Con. Laws., 2d Ed., Vol. 7, p. 7984.

CHAPTER VII.

Public Records.*

The official records are found principally in the following offices :

Secretary of State,
State Comptroller,
State Engineer and Surveyor.

1. There may also be found in the library of the Attorney General of the State of New York an index of material in New York documents, 1789 to 1904, prepared by Adelaide R. Hasse. In this index may be found a list of land grants as follows:

- (a) British.
- (b) Macomb Purchase.
- (c) Military Tract.
- (d) Refugee Tract.
- (e) Totten & Crossfield Purchase.
- (f) Free Masons Patent.
- (g) Hardenberg Patent.
- (h) Holland Purchase.
- (i) Oneida Purchase.

This index also refers to a large number of documents, reports, histories, communications, etc., relative to other State lands, in particular canal lands, which may be found in the New York Public Library.

2. There may also be found in the library of the Attorney General of the State of New York an index of Assembly and Senate documents from 1777 to 1888, inclusive.

These two indices may lead to the discovery of books and documents which may be helpful in the determination of title to lands as between the State and individuals; also to other valuable information in determining conflicting claims of title.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 7, p. 7496.

3. The following are also in the library of the Attorney General:—

(a) Certified copies of ancient field notes and maps — 1772 to 1798.

(b) Calendar of land papers — 1643 to 1803.

(c) Early proceedings of the Commissioners of the Land Office in Assembly documents.

(d) Proceedings of the Commissioners of the Land Office — 1896 to 1918.

(e) Holland purchase, western New York, by Turner — 1849.

(f) Phelps & Gorham's purchase of ten counties — 1851.

(g) Miscellaneous collection.

PART TWO.

How the State Acquires Title — Effect Thereof.

Chap. VIII. Generally.

- IX. Old Canal Lands.
- X. Barge Canal Lands.
- XI. Highways.
- XII. Bridges.
- XIII. Forest Preserve, State Parks and Reservations.
- XIV. River Improvement and Water Regulation.
- XV. Historical Places.
- XVI. State Lands — Generally.

CHAPTER VIII.

Generally.

First. Appropriation.

A. Due Process of Law.

- 1. Limitations.
- 2. Necessity.
- 3. Method.
- 4. Extent.

B. Appropriation is a Sale.

Second. Appropriation by Entry.

A. Estoppel.

Third. Adverse Possession.

First. Appropriation of Private Property.*

Private property shall not be taken for public use without just compensation.

Constitution of the U. S., 5th Amendment.

Constitution of the State of N. Y., Article 1, Section 6.

To state the converse of the rule:

* See also NOTE, N. Y. Ct. of App. Rep., (Bender Anno. Ed., Bk. 5, p. 202; Bk. 3, p. 197; Bk. 22, p. 593; Bk. 26, p. 1125.

See generally, Nichols on Eminent Domain, 2d Ed.

See Weed's Practical Real Estate Law, p. 195.

Private property may be taken for public use by making just compensation.

“The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation. The State has all the power of eminent domain there is and all that any sovereign has, subject to the limitations of the Constitution.”¹

It should, therefore, be noted that the only constitutional limitations to the taking of private property are:

That the use must be public;²

That compensation must be made or provided.³

A. DUE PROCESS OF LAW.

The State in taking private property may act only through the Legislature, the power of which is limited only by the Constitution.

The Legislature may delegate the right to take to a State officer, to illustrate,—the State Engineer or to a commission.

The Legislature, in delegating the right to take, may impose limitations in addition to those imposed by the Constitution and may delegate to a State officer the right to determine the *necessity* for taking.

The Legislature in addition may require that the State officer may not alone determine the *necessity*, but that such necessity shall be subject to the approval of some State board, to illustrate,—the Canal Board.

The Legislature may also provide the *method* of taking, which may be in more or less detail.

The Legislature may also determine the *extent* to which the State officer or board exercising the power of appropriation may act in taking private property. Such *extent* would be limited by the amount of funds made available by the Legislature. Such State officer can only take private property of a value measured by the amount of funds made available by the Legislature. In taking

1. *People v. Adirondack Railway Co.*, 160 N. Y. 225, 237.

2. *Matter of Mayor*, 135 N. Y. 253.

3. *People v. City of Rochester*, 50 N. Y. 525, 30.

or attempting to take more private property than that, the effort would be ineffectual or such State officer may not be protected.⁴

The taking of private property

1. within the *limitations* imposed by the

(a) Constitution and the

(b) Legislature

2. after a determination as to the *necessity* consistent with the power and authority of making such determination, and

3. the following of the *method* of taking as prescribed by the Legislature,

4. within the *extent* and limit of funds made available by the Legislature,

may be considered *due process of law*, which the Constitution guarantees.⁵

The Legislature may provide that a State officer may enter upon, take possession of and use, *i. e.*, appropriate private property, whereupon, if the State officer does enter upon, take possession of and use a particular parcel of land, the *appropriation* or condemnation *becomes complete* by operation of law, if no other requirements are imposed. The early canal acts provided only for the *taking* of lands; no survey, map or notice was required.⁶

The Legislature may provide that on the possession of lands by the State officer, title shall thereupon vest in the State, on condition that the Legislature has further provided a "certain, convenient and adequate source and means of payment."⁷

This rule was not followed by the Court of Appeals in *State Water Supply Com. v. Curtis*, 192 N. Y. 319. The court was considering a statute which authorized the State Water Supply Commission to acquire lands for the purpose of river improvement and to issue bonds for the cost thereof. Judge Bartlett, in an opinion concurred in by all the judges, expressed the fundamental law as follows:

4. *Litchfield v. Bond*, 186 N. Y. 66.

Opinion of Attorney-General Julius M. Mayer, 1905, p. 187.

5. Art. 1, § 6, State Constitution.

Matter of City of Rochester v. Holden, 224 N. Y. 386.

See also, *People v. A. R. Co.*, 160 N. Y. 225, 36.

6. *Birdsall v. Cary*, 66 How. Pr. 358.

7. *People v. Adirondack Railway Co.*, 160 N. Y. 225, 241.

“ If this statute, according to its fair import and meaning, authorizes the State Water Supply Commission to take possession of lands sought to be acquired for the purposes of river improvement thereunder without first making adequate compensation therefor, then it is undoubtedly in conflict with the Constitution. * * * If, therefore, the statute be taken to authorize the appropriation of lands and the permanent occupation thereof by the State Water Supply Commission (that is to say, the permanent occupation thereof as distinguished from the temporary occupation merely for purposes of preliminary survey, etc.), without previous payment of the fair value thereof to the owner as ascertained either by agreement or fixed in condemnation proceedings, it must necessarily be condemned as in conflict with the fundamental law.”

The filing of a map may *ipso facto* work an appropriation.⁸

The Legislature, as an alternative to *possession* or the filing of a map or a description of lands appropriated, may provide for a taking by the giving of *notice* to the owner of the property required, in which event *possession* is not a requisite.

The Legislature may provide that certain steps shall be taken before the right of entry has matured, *i. e.*, that a map of the lands required shall be made by the State Engineer and approved by the Canal Board and filed in specific State offices, and in addition in the office of the clerk of the county, where the required lands are located (although filing in the county clerk's office is not necessary); and that thereupon, but not until then, the State Engineer may take possession. The appropriation may thereupon be declared to be complete.

If a “ certain, convenient and adequate source and means of payment ” has been provided, *i. e.*, if adequate provision is made as to the giving of a notice to the owner of property appropriated, that such property has been appropriated, and if funds have been made available, it may also be provided inferentially or specifically that thereupon title shall vest in the State.⁹

8. Matter of City of New York, 212 N. Y. 538.

9. Kahlen v. State, 223 N. Y. 383.

See also, Matter of City of Syracuse, 224 N. Y. 201.

Such a procedure need not require immediate entry and the necessity for entry would not exist.

However, if immediate entry is not provided for, or is not made, it is necessary that the owner of property appropriated shall have notice of the appropriation or of an opportunity for compensation. The notice to the owner may be:

1. A notice of an appropriation; or
2. If not so notified, a notice as provided by Sections 281 and 281a of the Code of Civil Procedure in the nature of a notice of interpleader in a proceeding before the Court of Claims. (Sections 20 and 21, Court of Claims Act.)

If neither of such notices are given, and an award is made for the lands taken and such an award deposited in court under Section 268a of the Code of Civil Procedure, a notice to the owner of property so appropriated of any application for a distribution of the award¹⁰ and a failure to question the sufficiency of the award, would probably bar any further claim.

The Legislature may provide for the service of a notice on an owner of lands required, as a *condition precedent* to entry by the State Engineer, excepting for purposes of survey. This is required by the Barge Canal Acts. Entry before service of notice is a trespass.¹¹

The purpose of the service of such a notice is to fix the rights as between the owner and the State —

1. To preclude the owner from thereafter conveying his property, if proof of service is duly recorded in the county clerk's office;
2. To fix the liability of the State and the date thereof, even though actual entry may not be made for a considerable time thereafter; and
3. To vest title in the State and fix the date thereof if the act so provides or may be so construed.¹²

10. Section 268b, Code of Civil Procedure; sec. 28a, Court of Claims Act.

11. Van Alstine v. Belden, 41 A. D. 123; 58 N. Y. Supp. 521; af. 161 N. Y. 661.

12. Kahlen v. State, 223 N. Y. 383.

Such a notice must be of the kind to constitute notice to the owner. Notice is a "means of knowledge."¹³

B. AN APPROPRIATION IS A SALE.*

An appropriation or a condemnation of real property in proceedings under a statute operates when perfected as a transfer of title and is in a legal sense the purchase and sale of the lands or an interest in the land appropriated or condemned. Private titles are subject to the supreme power of the State, and it may act directly or authorize others, such as a railroad company or a municipality, to take property by condemnation proceedings. In theory, the owner assents to this exercise of sovereign power. The compensation awarded is a substitute for the land or interest taken. A condemnation proceeding by a railroad company operates as a sale of property taken and a purchase by the company. The interest acquired by the company, whatever its exact legal character, is "scarcely less than a fee."¹⁴

In *Clarke v. L. I. R. Co.*,¹⁵ lands which had been sold under an executory contract of sale were acquired by the City of New York under right of eminent domain. The court held that at the time of the taking the vendee under the contract had the equitable title; that the vendor had a lien for the payment of the purchase money; that the purchaser under the contract was deemed to have acquired the lands subject to the possibility of the lands being taken for public use; that this possibility of taking was deemed to have been within the contemplation of the parties. It was a case of where one party had sold lands to another, who in effect sold to the City of New York. The lien of the original vendor for the unpaid balance of the purchase price was transferred from the land to the award, although the award might not have been sufficient to pay the lien if the property had depreciated

13. *Matter of Union E. R. R. Co. of Brooklyn*, 112 N. Y. 61, 75.
Matter of City of New York, 212 N. Y. 538, 544.

* See Weed's Practical Real Estate Law, p. 199.

14. *Vandermulen v. Vandermulen*, 108 N. Y. 195.

15. 126 A. D. 282; 110 N. Y. Supp. 697.

in value between the time of the original sale by contract and the condemnation thereof.¹⁶

The Jackson case involved an appropriation of lands by the State for Barge Canal purposes. The court held that a "condemnation is an enforced sale, and the State stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined."

In the Matter of Nassau Electric Railroad Company,¹⁷ an appropriation was held to be a condemnation. The rights of the parties are the same whether the State appropriates or condemns or whether the condemnation is by a municipality or corporation under authority delegated by the Legislature of the State.

On the completion of the appropriation and the vesting of title in the State, *i. e.*, on the sale and purchase, the State — the purchaser — is liable. This liability when the amount thereof is fixed is commonly called an award. The award until paid is held by the State. It takes the place of the land appropriated. The same persons who owned or were interested in the land, own or are interested in the award, and to them the State must pay.¹⁸

Tiffany Studios v. Seibert¹⁹ held that even though title to certain lands was vested in executors as trustees with power of sale, the discretion conferred upon them applied only to getting full value for lands devised to them; that a condemnation of such lands was a sale by them. "That exercise of discretion was met and satisfied by a taking of the property by the city, when its full value must be assumed to have been awarded, and by payment of the whole consideration in cash."

An owner of real property executed a will, but before her death the property was condemned by the City of New York. The devisee in the will claimed the fund arising from the award on the ground that it was real property. In passing upon this contention the Court of Appeals in *Ametrano v. Downs* (170 N. Y. 388) laid down the following rules:

16. *Hunter v. City of N. Y.*, 151 A. D. 30; 135 N. Y. Supp. 253.

Jackson v. State, 213 N. Y. 34.

N. Y. T. Co. v. State, 169 A. D. 310; 154 N. Y. Supp. 1059; *af.* 218 N. Y. 738.

17. 173 A. D. 253; 159 N. Y. Supp. 473.

18. See *Murphy v. Hirshman*, 168 A. D. 153; 153 N. Y. Supp. 849.

19. 178 A. D. 787; 166 N. Y. Supp. 304; *af.* 223 N. Y. 712.

(a) Had the devisee voluntarily alienated her property by deed, the devisee would have no claim to the proceeds of the sale; these proceeds will become and remain personal property even though in the nature of a purchase money mortgage.

(b) A different rule does not obtain in case of involuntary alienation by operation of law; there is no distinction in principle.

(This decision, rendered in 1902, was considered an original authority, page 392.)

(c) A sale by execution or judicial decree in the lifetime of an intestate, converts the proceeds into personalty, while if the sale is made after his death, they remain real estate.

(d) An exception results where property belongs to an infant or to an incompetent, in which case the proceeds retain their original character of realty.

Matter of Mayor²⁰ involved a situation where the owner of a vacant lot and one-half of the street in front thereof, not then opened by public authority but shown on a map, conveyed such lot and one-half of the street after the City of New York acquired title to the street by condemnation. The court held that on the vesting of title to the street in the city, the right to damages being a mere right of action not running with the land, vested in the then owner; that on payment such payment related back to the original debt which accrued at the time of the taking. The right to the award and any payment made thereunder did not pass by virtue of the deed by reason of the fact that such deed contained a description including the lands already taken by the city; this right would only pass when specially assigned or described as such in the conveyance.

The foregoing review of the law relative to the acquisition of title by the State generally and of the method and effect thereof is of importance to prospective purchasers of lands in all parts of the State of New York, for the reason that the State has acquired and is now acquiring lands for canal, park, conservation and other State purposes, including State institutions of every description. The method of acquisition is governed by general

20. 116 A. D. 252; 101 N. Y. Supp. 613.

and special acts. No uniform method of procedure is prescribed. In many instances, no records may be found in the county clerk's office of the county where the lands appropriated are situated; an individual may assume to convey lands, title to which has already vested in the State; a deed from him to another individual may convey no title; evidence of the State's title may only be found by consulting the records in the offices of various State officials.

Second. Appropriation by Entry.*

Although there may be a statutory provision requiring the making of a survey, the filing of a map, approval by a certain State board or officer, service of notice on the owner and other steps as a requisite to the vesting of title in the State and in order to make an entry by the State legal, it has frequently occurred that there has been an actual entry and appropriation without taking the prescribed steps. The entry, if followed by continuous possession and occupation, may be evidenced on the ground, and an inspection of the premises may disclose such entry and occupation and thus put a prospective purchaser on guard.

If the entry is illegal in that it is made before necessary statutory proceedings have been taken, an owner may be able to maintain ejectment. It has been found, however, that the owner does not always institute ejectment proceedings but in some cases has filed a claim with the Court of Claims and has adopted the entry as a legal appropriation, the State not denying the appropriation but consenting to a trial of the claim and to an award on the theory that the lands have been legally and permanently appropriated. Such action on the part of the owner and the State might be indicated only by the records on file in the office of the Court of Claims.

A. ESTOPPEL.†

It may be assumed that on the award by the Court of Claims of full value of the lands so appropriated and the payment of

* See generally, Nichols on Eminent Domain, 2d Ed.

American Woolen Co. v. State, 195 A. D. 698.

† See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 26, p. 634.

See Weed's Practical Real Estate Law, p. 197.

such an award, title would vest in the State and the owner would be estopped from denying same and from thereafter claiming title.²¹

As an illustration, attention is directed to *People v. Fisher* (190 N. Y. 468), involving title to several thousand acres of land in Herkimer County. The Superintendent of Public Works was given authority to erect and maintain a dam and thereafter to raise said dam and thus flood a large area. The lands were overflowed and permanently flooded, a claim was filed by the owner and an award made for the value of such lands without taking any of the statutory proceedings for the acquisition of title to the lands so flooded. Pending the proceedings, however, a survey was made by the State Engineer of the lands flooded and lands in addition thereto, and following the award by the Court of Claims, Notice of Appropriation was served. Four days after, the award was paid to the claimant and the Court of Appeals held that title vested in the State not only to the lands flooded but also to the lands between the flow line and the line of the survey.

But, if the State has done nothing to interfere with or control the possession of lands and no notice of appropriation has been served on the owner, the entry upon lands by the State and the erection of a dam thereon will not constitute an appropriation or the taking possession of lands which may be flowed or flooded as a result of the construction of the dam, even though the flow line has been surveyed to the knowledge of the owner of the land. Various acts were passed by the Legislature authorizing the construction of a reservoir on Black River and providing for the expense thereof. Surveys were made and stakes set. This extended over a period of years during which certain construction work was done. But no provision was made for the acquisition of title to lands to be flowed until after the owner thereof had conveyed a right of way to a railroad company which constructed its line across lands which would be flooded as a result of the construction of the dam. Notice of appropriation was not served until after the railroad was constructed. In *N. Y. C. & H. R. R. Co. v. State*,²² it was held that the owner was not precluded from con-

21. See *Ametrano v. Downs*, 170 N. Y. 388, 92.

22. 37 A. D. 57; 55 N. Y. Supp. 685; af. 177 N. Y. 577.

veying his land or a right of way over and across same to the railroad company before formal appropriation by service of notice. The rule laid down in *Waller v. State*,²³ that mere words of appropriation, unaccompanied by any act on the part of the officers of the State by taking possession of or controlling property to be appropriated, cannot amount to an actual and complete appropriation, was followed. It was not only necessary, in order to effect an actual appropriation of lands to be flooded, to enter upon and construct the dam, but it was also necessary to fill the reservoir created thereby and to flood the lands desired.

Third. Adverse Possession.*

An entry by the State under color of title and a claim to own lands entered upon in fee, pursuant to a statute which declared that the fee simple of all the premises appropriated should be vested in the People, vests the absolute title in the State by adverse possession. Title by adverse possession may be acquired by the State for the use of the public and where the State was in the actual possession and occupation of premises claiming to own them under statutes and the acts of its officers, the State is held to have title.

Whether the State acquires the fee to lands taken by condemnation or by adverse possession, its title does not revert to the original owners upon the sale thereof because the State has the right to sell the same or to dispose of such lands in any way that it chooses, regardless of the fact that it made no compensation to anyone for the lands.²⁴

23. 144 N. Y. 579.

* See Weed's Practical Real Estate Law, p. 53.
Wood on Limitations (4th Ed.), pp. 7, 1218.

24. *Eldridge v. City of Binghamton*, 120 N. Y. 309.
See also *Birdsall v. Cary*, 66 How. Pr. 358.

CHAPTER IX.

Old Canal Lands.

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First. Early History.

By Chapter 237 of the Laws of 1816, five Commissioners were appointed to adopt measures to effect communication by means of canals and locks between the Hudson River and Lake Erie and the Hudson River and Lake Champlain. The Commissioners were charged with the duty of making surveys and locating routes, and they were authorized to make application to all citizens or inhabitants for grants or donations of land for the purpose of constructing said canals.

Grants or donations, which were otherwise known as "cessions," to the number of nearly 200 were made between the years 1816 and 1821, inclusive. They may be found on file in the office of the

State Comptroller (Canal Bureau) in Albany. They have not been recorded in the various county clerks' offices of the counties in which the lands described therein are located. These cessions grant and forever transfer to the People of the State of New York all lands belonging to the one executing same, which shall be necessarily occupied by the site of the canal, towing paths, feeders, aqueducts, reservoirs, spoil banks, embankments, drains and culverts connected therewith.

By Chapter 262 of the Laws of 1817, the Commissioners appointed by Chapter 237 of the Laws of 1816 were continued in office and denominated "The Canal Commissioners."

By the same Act there was constituted a fund to be denominated "The Canal Fund," which was to be managed by a Board of Commissioners to be denominated "The Commissioners of the Canal Fund," consisting of the Lieutenant Governor, Comptroller, Attorney General, Surveyor General, Secretary and Treasurer.¹

"The Canal Commissioners" were authorized to commence making the said canals and by themselves or any superintendent, agent or engineer employed by them, "to enter upon, take possession of and use" any lands, waters and streams necessary for the prosecution of the improvements. As to any lands so appropriated, it was their duty to secure the appointment of appraisers, who were charged with the duty of making an estimate and appraisal of the lands appropriated.

It was further provided that "The Canal Commissioners" shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in the People of this State.

Under the early Canal Acts, no provision was made for the survey of the several parcels of land required for canal purposes; no maps of the lands appropriated were required, and it was not necessary to serve any notice upon the owners of lands so appropriated.

As stated by the Court in *Van Alstine v. Belden*,² power was

1. Article V, Section 5, of the State Constitution specifies the present personnel of the Commissioners of the Canal Fund and provides that such Commissioners, together with the State Engineer and Surveyor and the Superintendent of Public Works, shall constitute the Canal Board.

2. 41 App. Div. 123; 58 N. Y. Supp. 521; af. 161 N. Y. 661.

vested in the Canal Commissioners to take such lands as the commissioners determined necessary. "Their *ipse dixit* seemed to be all that was essential."

A. PUBLIC RECORDS.

The early history of the canals has been frequently reviewed by the courts, and several histories, reports and other papers have been prepared which help to throw some light on what land was actually acquired by the State for canal purposes.

There may be found in the office of the Attorney General in Albany the following:

New York Canal Claims Digest, 1818 to 1858, compiled by S. P. Allen, Clerk of the Senate, by authority of a Senate Resolution. This is a digest of claims and the action thereon by the Legislature and the Canal Board, together with the awards made by the Board of Canal Appraisers from 1818 to 1858. The names of the claimants, the nature of the claims, the action taken thereon and the awards, together with the date thereof, are set forth.

A similar digest covering claims from 1860 to 1865, and another from 1866 to 1870, inclusive, are in the library of the Attorney General.

There may also be found in the office of the Attorney General:

A history of New York Canals, by Whitford — 1906;

Proceedings of the Canal Commissioners covering various periods and years;

New York State Waterways and Canal Construction, by Hill — 1908;

Reports of the State Engineer on Canals, all of which may be found helpful in determining these questions of title.

There are in the following offices books, records or maps that may indicate the source of the State's title:

1. STATE COMPTROLLER, BUREAU OF CANALS. Grants, leases, &c., 1816 to date; including about 190 "Deeds of Cession" with separate index, mostly prior to 1830, and stating name of Canal, but giving no description of property. A list of the "Cessions" may be found in "Appendix II-a."

A special report by the Canal Commissioners, made or filed April 3, 1817, and found in the legislative documents for 1817 and in the Legislative Reference Library in a bound volume of Canal Commissioners' Report for 1816, states they had 56 grants of land west of the Seneca River. As the Comptroller's office has less than 56 grants dated before April 3, 1817, the 56, or a part thereof, may be in the Western Division Engineer's office, with grants of land for the Genesee Valley Canal, or elsewhere.

2. SECRETARY OF STATE. Releases to the People of the State of New York; 1816 to date.

3. SUPERINTENDENT OF PUBLIC WORKS. Appropriations, including appropriations by the Canal Commissioners; 1816 to date.

4. COUNTY CLERKS' OFFICES. Recorded plats (without written description) accompanying Awards made by the Canal Appraisers for lands appropriated from 1834 to date.

(Original awards said to have been destroyed in the Capitol fire.)

5. MIDDLE DIVISION appropriations for \$9,000,000 enlargement are found in the Middle Division Engineer's office.

6. LEGISLATIVE REFERENCE LIBRARY:

- (a) Reports of Canal Commissioners;
- (b) Reports of Auditor of Expenditures for the Canals, 1847-1883;
- (c) Reports of Court of Claims;
- (d) Reports of Board of Claims;
- (e) Digest of Claims, 3 volumes.

7. STATE COMPTROLLER'S OFFICE:

- (a) Book entitled "Index to Damages."
- (b) Vol. I, of Digest of Claims (1818-1858).

In case no claim was made within the time fixed by law, title may have been acquired by the State without payment, and no record may be found.

The State acquired title to certain canals after the construction thereof, by deed of conveyance. Such a deed was made by the Oneida Lake Canal Company to the People of the State of New

York. It is dated April 3, 1841, and is on file in the office of the State Comptroller (Canal Bureau). It is not recorded anywhere. The deed conveys lands in Madison and Oneida counties.

By Chapter 336 of the Laws of 1884, the Superintendent of Public Works or other authorized agent of the State was required to serve upon the owner of lands, streams or waters thereafter appropriated for canal purposes, a notice of such appropriation containing a description of the lands, streams or waters so appropriated. As a result there has been less uncertainty as to descriptions of lands taken since that time.

Chapter 118 of the Laws of 1888 provided that a duplicate of the notice was to be recorded in the office of the clerk of the county where the land appropriated was situated, thus insuring greater permanency of record, and giving notice to prospective purchasers.

The Canal Law of 1894 revised in one statute the various provisions relating to canals. Sections 70, 71 and 72 of Chapter 338 of the Laws of 1894 provided for

1. The permanent appropriation of lands for construction purposes ;
2. The permanent appropriation for repairs ;
3. The temporary appropriation for repairs.

Second. Canal Law.

A. HOW APPROPRIATIONS ARE MADE.*

The present "Canal Law," being Chapter V. of the Consolidated Laws, is Chapter 13 of the Laws of 1909, as amended. The following sections of the "Canal Law" are substantial re-enactments of Sections 70, 71 and 72 of the Act of 1894:

1. *Permanent for Construction.*

§ 80. ENTRY UPON LANDS. The superintendent of public works may enter on, take possession of and use any lands, structures and waters, the appropriation of which for the

* See generally, Nichols on Eminent Domain, 2d Ed.
B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 959.

use of the canals and the works connected therewith, and for the execution and completion of any repairs or improvements directed by the canal board or legislature to be made, shall in his judgment be necessary. An accurate survey and map of all such lands shall be made by the state engineer and certified by him to be correct, and the superintendent of public works shall indorse thereon or annex thereto a certificate stating that the lands described therein have been appropriated for the use of the canals of the state, and such map, survey and certificate shall be filed in the office of the state engineer. The superintendent of public works shall thereupon serve upon the owner of any real property so appropriated a notice of the filing and the date of filing of such map and survey, and specifically describing that portion of such real property belonging to such owner, which has been so appropriated, and from the time of such service, the entry upon and appropriation by the state of the real property described in such notice, for the uses and purposes of the canals, shall be deemed complete, and such notice shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the lands appropriated.

The superintendent may cause duplicates of such notice, with an affidavit of due service thereof on such owner, to be recorded in the books used for recording deeds in the office of the clerk of any county of the state where any of the property described therein may be situated, and the record of such notice and of such proof of service shall be evidence of the due service thereof.

2. *Permanent for Repairs.*

§ 81. PERMANENT APPROPRIATION FOR REPAIRS. Whenever in the judgment of the superintendent of public works any of the earth structures of the canals of the state should be raised, widened, strengthened or otherwise improved, he may enter upon and permanently appropriate to the use of the state so much of any lands adjacent to the canals as may be necessary to provide earth and gravel for such purposes.

Claims for damages by reason of any such appropriation may be adjusted and paid by the superintendent, if the amount thereof can be agreed upon with the owners of the lands appropriated, but such amount shall not be paid out of the treasury unless the canal board shall approve thereof.

3. *Temporary for Repairs.*

§ 82. TEMPORARY APPROPRIATION FOR REPAIRS. Whenever the navigation of any canal is interrupted or endangered, the superintendent of public works shall, without delay, repair the injury causing or threatening such interruption, and for that purpose he may, by himself or by his agents, enter upon and use any contiguous lands, and procure therefrom all such materials as in his judgment are necessary or proper to be used in making such repairs, and agree, subject to the approval of the canal board, with the owner of the property so appropriated upon the amount of damage to be paid him therefor.

From the foregoing three sections, it is to be noted that the Superintendent of Public Works may permanently appropriate lands for the construction or enlargement of the canals of the State when directed by the Canal Board or Legislature so to do. Such a direction has frequently been given. To illustrate: The Legislature by Chapter 624 of the Laws of 1913 authorized the Superintendent of Public Works to appropriate lands for the improvement of Ellicott Creek between the Erie Canal and the City of Tonawanda. The act provided that compensation was to be made "in the same manner that lands are authorized by law to be acquired or damages fixed for canal purposes."

Where lands are appropriated under Section 80 of the Canal Law, the amount of compensation is fixed by the Court of Claims after filing a claim with that court.

Under Section 81 of the Canal Law (above quoted), there is no provision for a direction by the Canal Board or Legislature; the Superintendent of Public Works may appropriate lands for the purposes specified when in his judgment same are necessary. The purposes specified are "to provide earth and gravel" for

raising, widening, strengthening or improving "any of the earth structures of the canals."

Claims arising from such appropriations may be adjusted and paid by the Superintendent with the approval of the Canal Board. In case of disagreement or nonapproval by the Canal Board, the Court of Claims would have jurisdiction to hear and determine a claim.

Section 82 of the Canal Law (above quoted) provides for the taking of "material" when navigation is interrupted or endangered. Compensation may be fixed and made in the same way as provided by Section 81.

In an appropriation under Sections 80 or 81, title to the lands appropriated would vest in the State. In an appropriation under Section 82, title is not affected; no preliminaries are provided; the Superintendent is simply authorized to "enter upon and use" lands and take therefrom earth, gravel, stones and other material for use in preventing or repairing a break in the walls of the canal or making other repairs.

A permanent appropriation of lands may be effected by the building of a dam and overflowing lands³ and the Superintendent of Public Works may also secure a supply of water and water privileges as provided by Sections 86 and 87 of the Canal Law as follows:

§ 86. AGREEMENTS FOR THE PURCHASE OF WATER PRIVILEGES. Whenever it is necessary to secure to a canal an additional supply of water, the superintendent of public works may agree with the proprietor of any hydraulic privilege affected by the taking of any such additional supply as to the terms and conditions on which the same may be taken.

§ 87. SUPPLYING DEFICIENCIES OF WATER. Whenever the navigation of any canal is endangered by reason of a deficiency of water, the superintendent of public works shall, without delay, supply such deficiency. For that purpose, he shall resume the temporary use of all the surplus water leased upon the level of the canal where such deficiency exists. If there be still a deficiency of water, he may enter upon and

3. *People v. Fisher*, 190 N. Y. 468.

use all lands, streams and waters, which, in his judgment, may be necessary or proper to be used to procure a temporary supply of water for such canals. The superintendent may agree with the owner of any property used for temporary purposes under this section, on the amount of damages sustained by him thereby, subject to the approval of the canal board, but no damages shall be allowed in any case for resuming the use of any leased surplus water.

The State canals are defined by Section 2 of the Canal Law as follows:

§ 2. DESIGNATION OF CANALS. This chapter applies to the following canals:

1. The Erie canal, connecting the waters of Lake Erie with those of the Hudson river.

2. The Champlain canal, connecting the waters of Lake Champlain with those of the Hudson river.

3. The Cayuga and Seneca canal, commencing at Geneva and terminating near Montezuma, connecting the waters of Seneca lake with the Erie canal.

4. The Oswego canal, commencing at Syracuse and terminating at Oswego.

5. The Black River canal and Erie canal feeder, extending from the foot of the high falls in the Black river, in the county of Lewis, to the Erie canal at Rome, with a navigable feeder from the Black river to the summit level near the village of Boonville.

The term "canal," as used in this chapter, includes all the side cuts, feeders and other works belonging to the state connected therewith.

It is to be noted, as provided by the last paragraph, that "side cuts, feeders and other works" belonging to the State and connected with the canals are included within the designation.

It has frequently happened in the construction of the canals that a stream has been intercepted and made to empty into and feed the canal, thus depriving lower riparian owners of the water

previously flowing over their land. Likewise, spillways have been located at different points and surplus waters have flooded lands by enlarging streams or creating new channels.

Claims have been filed for the taking of such waters or for precipitating waters upon lands of others, on the payment of which the State has secured the right to continue the diversion or flooding.

Skaneateles Lake was appropriated for the use of the canals in the year 1843 by authority of the Legislature. The appropriation covered the lake and the outlet for a reservoir and feeder to the Erie Canal. Lands were appropriated at the foot of the lake for the purposes of a dam. The effect of this appropriation was considered at length in *Sweet v. The City of Syracuse* (129 N. Y. 316). It was held that the State did not appropriate the land generally but only the water; that flowing water could not be appropriated as it is not the subject of exclusive control; that neither the State nor an individual could acquire more than a usufructuary right to running water; that the State acquired the right to the use of this water only; that the only property right which the State acquired in and to the waters of the lake and outlet was "the right to divert and use the same in such quantities as may be necessary for the use and operation of the canal." It was further held that "subject to this paramount right, the riparian owners may use the waters of the lake and stream for domestic or manufacturing purposes and the public as a highway for boats and other craft."

This decision is of great importance and may be decisive of many similar questions. It is to be noted that there was involved the following rights:

1. People of the State of New York through the officials thereof in charge of the canals of the State to take water from the lake for the purposes of operating the canals.
2. The public at large to navigate the lake and use same as a highway for boats.
3. Riparian owners of lands beneath and alongside the lake and outlet, to the waters thereon and flowing over same.
4. The City of Syracuse to take waters from the lake not required for the use of the canal, pursuant to legislative enactment.

Third. Maps of Canal Lands.

As to lands taken under the Act of 1817, or before maps were required to be made in the first instance, the Legislature has at different times provided that maps should be made of all of the canal lands of the State.

Chapter IX, Title IX, Article 1, of the Revised Statutes of 1829, provided for the making of a manuscript map of every canal then or thereafter completed and of all the lands belonging to the State adjacent thereto or connected therewith, on which the boundaries of every parcel of such lands to which the State shall have a title shall be designated. Such map was to be compiled by the Canal Commissioners who were authorized to cause all necessary surveys to be made. When prepared it was to be submitted to the Canal Board for approval and when approved, signed by the Canal Commissioners, certified by them to be correct and filed in the office of the Comptroller.

Provision was also made for filing a copy in the clerk's office of every county intersected by the canal to which the maps shall relate, and it was further provided that a transcript, duly certified, shall be received as presumptive evidence in all judicial and legal proceedings.

A. HOLMES-HUTCHINSON MAPS.

The so-called Holmes-Hutchinson Maps of 1834 were made pursuant to the provisions of the Revised Statutes of 1829, to which reference has been made. They consist of a series of maps bound in book form and covered the then canal system of the State. These maps were filed in the State Comptroller's office and may now be found there.

The importance and significance of these maps was presented in connection with a claim filed by John B. Miller et al. v. The State of New York, relative to lands in Niagara County. A copy of the maps had not been filed in the clerk's office of Niagara County. The opinion by Judge Rodenbeck of the Court of Claims is reported in 68 Misc., page 607, and 125 N. Y. Supp. 148. On appeal to the Appellate Division,⁴ the Court held that these

4. 164 A. D. 522; 149 N. Y. Supp. 788.

maps show the general lines of the canals and that the lands shown thereon had been appropriated for canal purposes and made a part of the canal system. The Court of Appeals⁵ affirmed without opinion but pointed out the fact that the Court of Claims had held that the State is the owner in fee of the lands covered by the appropriation and that claimants derived no title thereto by adverse possession or otherwise.

The foregoing decision is of especial importance for the reason that the 1834 maps not only show the general lines of the canal but lands and waters in juxtaposition to the canal. As a part of these maps, there is a written note as follows:

“Where any stream or pond is on the same level with the waters of the canal and the navigation is conducted in such stream or pond, the stream or pond is included in the canal to the high water mark of the stream with a berm bank on each side of fifteen links where no towing path is designated on the map.”

The meaning of “berm bank” was defined and it was held that there was an appropriation of this much of the land above water as though it had been enclosed within the lines of the canal itself.

It has been held, however, that mere words of appropriation of land for State purposes, without any act on the part of the officers of the State in carrying the appropriation into effect by taking possession of the lands appropriated or controlling the lands in some form, does not amount to an actual and complete appropriation. This question was considered by the Court of Appeals and the opinion of Judge Peckham in *Waller v. the State* is reported in 144 N. Y. at page 579.⁶

As the Court held in the *Miller* case⁷ that it was not necessary to file a copy of the map in the county clerks' offices, but that the provisions for so doing were permissive only, an examination of title to any land in a locality where these early canals were constructed is not complete by examining the records in the office

5. 223 N. Y. 690.

6. See also *N. Y. C. & H. R. R. Co. v. State*, 37 A. D. 57; 55 N. Y. Supp. 685; *af. 177 N. Y. 577*

7. 68 Misc. 607; 125 N. Y. Supp. 148.

of the county clerk only of the county where the land is situated; an examination of the records and maps in the office of the State Comptroller and State Engineer should also be made.

B. MISCELLANEOUS MAPS.

Following the compilation of the Holmes-Hutchison maps, it does not appear that any general maps were made until the year 1869. There were in the meantime, however, miscellaneous surveys and maps made by the State Engineer which may be found on file in the office of the State Engineer, covering particular parcels.

In the year 1869, the State Engineer and Surveyor prepared maps showing the enlargement of the Erie Canal from Albany to Schenectady including the Albany and West Troy basins. These maps were followed by maps of other portions of the enlarged canals of the State which were made by the Division Engineers from year to year, most of which are on file in the office of the State Engineer at Albany, but some of which are on file only in the offices of the Division Engineers.

By Chapter 79 of the Laws of 1895, provision was made for the enlargement and improvement of the Erie, Champlain and Oswego Canals and for the expenditure of \$9,000,000 for that purpose.

C. SCHILLNER MAPS.

In the year 1896, George L. Schillner, a draftsman in the office of the State Engineer and Surveyor, commenced a compilation of all maps of all lands which had been acquired for canal purposes to that time. This work extended over a period of twelve years to 1908, and as a result, there may be found on file in the State Engineer's Office a very complete set of maps, although they do not appear to have any official status. They were not certified by the State Engineer or certified to be correct or approved by the Canal Board — in fact they bear no endorsement.

The Canal Law of 1894 made provision, however, for the preparation of complete manuscript maps and field notes of every canal then or thereafter to be built and of all the lands belonging to the State adjacent thereto or connected therewith, and for the filing of same in the office of the State Engineer, and copies

thereof in the clerk's offices of the counties. (See Laws of 1894, Chap. 338, §§ 4 and 5.)

The law is the same today excepting as to a few minor amendments; the following being Sections 4 and 5 of the existing Canal Law (Chapter 13 of the Laws of 1909, as amended):

§ 4. MAPS AND FIELD-NOTES. There shall be kept on file in the office of the state engineer complete manuscript maps and field-notes of every canal now or hereafter to be built and of all the lands belonging to the state adjacent thereto or connected therewith, in which the boundaries of every parcel of land to which the state shall have a separate title shall be designated, and the names of the former owners and the date of each title entered. The expense of all such maps and field-notes shall be paid out of the appropriations made for the support and maintenance of the canals. All such maps and field-notes approved by the canal board or superintendent of public works or certified by such board or superintendent or by the state engineer to be correct, shall be presumptive evidence of the truth of the facts therein stated and of the ownership by the state of the lands therein described.

§ 5. COPIES OF MAPS AND FIELD-NOTES IN COUNTY CLERK'S OFFICE. A copy of every map and of all field-books and notes so filed or of such part thereof as relates to the canal lands in any county, certified by the state engineer to be a correct copy thereof, shall be filed in the clerk's office of such county, and shall be evidence with like force and effect as the original maps and field-notes of which it is a copy. Transcripts of a part of any such map or field-notes, certified by the officer having the custody of the original or certified copies from which they are made, to be correct copies thereof, shall be evidence as to the parts contained in such transcripts, with the same force and effect as if the originals were produced.

D. LATER MAPS.

In addition to the general powers conferred by the Canal Law, the Legislature in 1910, by Chapter 199, provided for the mapping of canal lands and lands adjacent thereto belonging to the State and

directed the State Engineer and Surveyor to survey and map canal lands not included within the lines of the so-called "Barge Canals." Following is such act in part:

Section 1. The state engineer and surveyor is hereby directed to make the necessary surveys, field notes and manuscript maps of all such portions of the Erie, Oswego and Champlain canals as are not within the lines of the improved Erie, Oswego and Champlain canals, and of all the lands belonging to the state adjacent thereto or connected therewith on which the boundary line or 'blue line' of any parcel of such land to which the state shall have a separate title shall be designated together with the names of adjoining owners.

§ 2. Every such map when completed shall be submitted to the canal board for its approval and when so approved shall be signed by the members of the canal board, be certified by them as correct and filed in the office of the comptroller.

§ 3. A transcript from the original map or from a copy thereof certified as correct, by the comptroller or by the state engineer and surveyor shall be received as presumptive evidence in all legal or judicial proceedings.

Since Chapter 199 of the Laws of 1910 became a law, the State Engineer has been engaged in carrying out the directions thereof and there may now be found on file the maps provided for, the work being practically completed. These maps supersede all previous maps in that they embrace all lands shown on previous maps. It is to be noted that a certified copy is *presumptive* evidence in all legal or judicial proceedings.

Before the State embarked on the project of constructing canals, there had been granted to the Western Inland Lock Navigation Company and to the Northern Inland Lock Navigation Company charters to construct and operate canals. These companies came into existence in 1792; they acquired lands and rights and constructed and operated canals which were later purchased by the State. The question has arisen as to what lands and what rights were acquired by these companies in the first instance and as to what property rights thereafter passed to the State. The rights

of the first named company were referred to in *Smith v. City of Rochester* (92 N. Y. 463, 83).

The lands acquired by these two companies are generally shown on the Holmes-Hutchinson maps, although not specifically so designated; they are included as a part of the canal lands. Some of these lands are located in the City of Little Falls, Herkimer County, and are occupied in part by manufacturing plants without any grant from the State. Although many of these lands have been abandoned for canal purposes by the Canal Board, a portion has never been granted by the Commissioners of the Land Office, and title thereto is still vested in the State as evidenced by the Holmes-Hutchinson map.

Fourth. Powers of Superintendent of Public Works.*

A. GENERALLY.

As above noted, the Superintendent of Public Works, under Section 80 of the Canal Law, is authorized to appropriate lands, structures and waters, when directed by the Canal Board or Legislature, which shall in his judgment be necessary. The general power to take must be given by the Canal Board or Legislature, after which it remains for the Superintendent of Public Works to determine what particular lands, structures or waters are required in order to make the improvement directed by the Canal Board or Legislature. The general powers and duties of the Superintendent of Public Works are set forth in Section 33 of the Canal Law.

B. AS TO RAILROADS AND OTHER STRUCTURES.†

The Superintendent of Public Works has been given a supervisory power over so much of any railroad as passes over any canal or feeder or approaches within ten rods thereof, regardless of the ownership of the land or right of way on which the railroad is or may be built. This power is conferred by Section 35 of the Canal Law, which reads as follows:

* See B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 940.

† See B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 944.

§ 35. POWERS WITH REFERENCE TO RAILROAD NEAR THE CANALS. The superintendent of public works shall have a general supervisory power over so much of any railroad as passes over any canal or feeder belonging to the state, or approaches within ten rods thereof, so far as may be necessary to preserve the free and perfect use of such canals or feeders, or for making any repairs, improvements or alterations thereupon. No railroad corporation shall construct its railroad over or at any place within ten rods of any canal or feeder belonging to the state, unless it submits to the superintendent of public works a map, plan and profile of such canal or feeder and of the route designated for its railroad, exhibiting distinctly and accurately the relation of each to the other at all the places within the limits of ten rods thereof, and obtains the written permission of the superintendent of public works and of the canal board for the construction of such railroad, with such condition, directions and instructions as in his judgment the free and perfect use of any such canal or feeder may require. Whenever any street railroad shall cross over any bridge spanning a canal, or canal feeder, the company owning, maintaining and operating the same shall be deemed liable for and shall pay all damages that may occur or arise, either to the state or to individuals, by reason of its laying and maintaining its tracks or rails over, upon and across any such bridge, or by reason of the operation of its cars over the same; and any such company shall upon demand of the superintendent of public works, make any repairs to such structure to insure the continued safety thereof as shall have been rendered necessary by reason of such use of said structure by said company. Any company so maintaining or operating a street railroad over, upon and across any such bridge shall indemnify the state against any and all loss, damages or claims for damage, for injuries to person or property of passengers which shall be incurred by or made against such state by reason of the operation of such railroad over any such bridge, and the superintendent of public works may, in his discretion, require any company so maintaining or operating a street railroad to furnish a bond, with sureties

to be approved by him, to indemnify the state from all such loss, damage or claims. All such permits heretofore or hereafter granted shall be revocable whenever the free and perfect use of any such canal or feeder may so require, or if such railroad company shall fail to make any such repairs when required by the superintendent of public works. The railroad company using or occupying any bridge over the same shall, within a reasonable time after the service upon it, by the superintendent of public works, of written notice of such revocation, or to make such repairs, remove at its own cost and expense its railroad from such bridge and from the limits of ten rods of said canal or feeder.

The foregoing provision should never be lost sight of by transportation companies when approaching canal lands, as the supervisory power is given the Superintendent not only over the canal lands owned by the State but over a ten rod strip by whomsoever owned on either side of the canal lands or feeders.

C. PERMITS.*

The written permission of the Superintendent of Public Works and of the Canal Board for the desired construction must be secured. This is in the nature of a revocable permit.

There is on file in the office of the Superintendent of Public Works, books of minutes of the Canal Commissioners commencing April 16, 1817, and continuing to the year 1878, or until they were succeeded in office by the Superintendent of Public Works. From that date may be found the minutes of the Superintendent of Public Works continuing to the present time. These books of minutes contain permits granted prior to 1896.

From 1896 to the present time separate books of permits have been kept and are now on file in the office of the Superintendent of Public Works. These permits run not only to railroad and other transportation companies, but cover any construction over or under canal lands or in proximity thereto.

Section 33 of the Canal Law, which defines the general powers

* See B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 944.

and duties of the Superintendent, provides in Paragraph 12 thereof that he may make all necessary rules and regulations for the safe and speedy navigation, protection and maintenance of the canals and structures thereof.

The form of permit has been changed from time to time. It has been necessary to consider each application separately excepting as to general provisions. The form now being used may be found herein and is designated as "Appendix III."

Permits may be issued for the following:

1. For the construction of bridges over and across or along the side of canal lands on which may be located tracks of steam, electric or other railroad companies and necessary approaches.
2. For the construction of tracks of steam, electric or other railroad companies in cases where bridges are not necessary.
3. For the construction of electric transmission lines including towers, poles, cables, wires, etc.
4. For the construction of telegraph and telephone lines.
5. For the laying of gas, sewer or water pipes or other pipe lines.
6. For the erection of structures.
7. For the construction of roads and driveways.
8. Miscellaneous purposes.

D. ICE ON CANALS AND OTHER WATERS.

By Section 33 of the Canal Law, Paragraph 13, the Superintendent of Public Works is granted power to issue permits to cut, gather and haul away ice from the canals.

The right and power of the State of New York to dispose of the ice formed on its canals and to restrict the right to take ice from the Erie Canal was considered by the court in *Green Island Ice Company v. Norton*.⁸ It was pointed out that the ice belongs to the owner of the fee where it is formed and that the State, being the owner of the fee, was the owner of the ice which formed thereon; that the control which the State exercised over the canals

8. 105 A. D. 331; 86 N. Y. Supp. 613; af. 189 N. Y. 529.

and their waters was different than that which it exercised over the navigable waters of the State.

The distinction was further made that the State owned the canals as it owned its public buildings; that the interest was collective and not several; that it was not an interest which permits anyone of the people to take and reduce to private ownership ice forming on the canals; that it was proper for the Legislature to provide that the Superintendent of Public Works might issue permits for cutting and hauling the ice; that no ice should be cut or hauled excepting on permit from the Superintendent of Public Works. As to the other navigable waters of the State which are public highways, the interest of the People is several and not collective, that is, any person may use these highways for purposes of travel.

This would give any person the right to travel upon the ice and to cut and take ice formed on navigable rivers, streams or lakes if the State owns the underlying fee, subject, however, to such regulations as would insure the safety of the general public which may travel over the ice so formed.⁹

If the State does not own the fee underlying a navigable river, stream or lake but same is vested in an individual, the right to harvest ice would vest in the fee owner, subject to regulations insuring the safety of the traveling public, on the same theory that the public has a right to travel over public highways but not to cut any trees growing within the bounds of the highway or to take therefrom crops growing thereon.

The question of the right to take ice from —

1. Canal waters covering lands through which a channel has been dug for a canal; also,
2. A canalized river, that is, a navigable river which has simply been adapted to canal purposes; also,
3. Waters impounded by a dam in a navigable river but extending beyond the banks thereof,

was considered in an opinion by Attorney General Egbert E. Woodbury December 19, 1916, reported in 10 State Department

9. *Slingerland v. International Contracting Co.*, 169 N. Y. 60.

Reports at page 476. As these reports are not widely circulated, and as the points discussed and decisions reviewed are of importance in determining the ownership of ice on State waters generally and the right to harvest such ice, the opinion is set forth in full. (See "Appendix IV.")

E. FORCE AND EFFECT OF PERMITS.

The force and effect of permits issued by the Superintendent of Public Works has been considered at various times. As regards railroads there should also be read in connection with Section 35 of the Canal Law, Section 8 of the Railroad Law, Paragraph 4, which gives to every railroad corporation power to construct its road across any of the canals of the State which the route of its road shall intersect or touch.

It is to be noted that the form of permit provides that the Superintendent of Public Works may at any time revoke and annul same and cause all structures placed under said permit to be removed from State land without cost or expense to the State and that the State has a right to re-enter and re-occupy lands covered by the permit, as the free and perfect use of the canals may at any time require or as it may be necessary for making repairs, improvements or alterations in and to the canals or for any cause whatsoever. This presents the question as to whether the removal of a structure may be compelled without showing cause, that is, showing that it does interfere with the free and perfect use of the canal or that such removal is necessary in order to make repairs, improvements or alterations to the canal.

Although Article VII, Section 8, of the State Constitution, provides that the Legislature shall not sell, lease or otherwise dispose of the canals, but that they shall remain the property of the State and under its management forever, this constitutional prohibition has not been construed as preventing the granting of permits.

The following opinion was rendered by the Attorney General to the Superintendent of Public Works on February 17, 1899:

*The Honorable the Superintendent of Public Works, Albany,
N. Y.:*

SIR.— I beg to acknowledge the receipt of your letter relating to your authority to grant the privilege of laying gas pipe

over one of the canal bridges under your charge, and the propriety of so doing.

Permit me to say that there is no provision of law governing this matter. I have no doubt of your right, as an incident of your supervisory powers to grant such privileges, under proper restrictions. In my judgment a permit of this character should only be granted when the gas pipe proposed to be laid shall be of a size that will not endanger the structure or interfere with its legitimate use. I think in a matter of this kind it will be proper to specify a reasonable compensation to be paid for such privilege, for the reasons you suggest.

Respectfully yours,

JOHN C. DAVIES,

Attorney-General.

In the year 1900, the Superintendent of Public Works asked the Attorney General for his opinion as to the power of the Superintendent of Public Works to enter into a contract with a telephone and telegraph company permitting such company to erect its poles and wires along the line of the canal and within the blue line, terminable only at the end of a specified number of years, or if sooner revoked, that the State would be liable for the expenses of construction.

An opinion of the Attorney General, dated March 28, 1900, is to the effect that it is not within the power of the Superintendent of Public Works to grant an irrevocable license to use the lands or the property of the State for a fixed period under the provisions of the Constitution and statutes fixing and defining his powers.

On March 3, 1911, Attorney General Thomas Carmody rendered another opinion to the Superintendent of Public Works relative to the right of the Superintendent to issue permits to railway companies to construct and maintain lines within the blue line and within the ten rod limit. The opinion was expressed that it was entirely proper for the Superintendent of Public Works, with the approval of the Canal Board, to give written permission for the construction of a railroad over any canal or feeder or within ten rods thereof, when in their judgment it was proper that such a permit should be granted. On March 23, 1911, the

Attorney General rendered another opinion to the Chairman of the State Board of Tax Commissioners relative to the rights of the West Shore Railroad Company under a permit issued by the Superintendent of Public Works pursuant to a decision of the court authorizing him so to do. The opinion of the Attorney General is in part as follows:

It is quite clear to my mind that the railroad did not acquire title to any of the lands occupied, by the so-called condemnation proceedings. The legal position is very clearly defined by Justice Churchill in permitting the company to acquire the right. He held as follows:

1st. The canals of this State, mentioned in Sec. 6, Art. 7, of the Constitution, as amended by vote of the People, Nov. 3d, 1874, include all lands within the blue lines, so-called, as indicated upon the official maps.

2d. The Constitution (Art. 7, Sec. 6) does not prohibit the construction by a Railroad Company of its roads across, along, or upon such lands, where intersected or touched by the route of its road.

3d. The right to such construction is limited, however, by the Constitution to such extent, as that the free and perfect use of the Canal for all its purposes as a Canal shall not be interfered with.

4th. Such construction can only be had upon the written permission of the Superintendent of Public Works, whose duty it is, to grant such permission only upon such conditions, and with such restrictions and limitations, as shall in his judgment make secure such free and perfect use of such canal, and with such right of re-entry and re-occupancy reserved on the part of the State, as such free and perfect use of such canal at any future time, may require.

5th. The value of the permission so given, subject to the conditions, instructions and limitations of the Superintendent of Public Works attached to it, is a proper subject of appraisal, and may be appraised by persons appointed by the Court for that purpose, in pursuance of

the statute for the appraisal of lands taken by railroad companies for the construction of their road.

The learned court made the following direction:

Let an order be drawn appointing appraisers to be approved by the Court to appraise the compensation to be given to the State for the occupancy subject to the permission as above of the Superintendent of Public Works.

The statute in effect at the time of this decision authorizing the giving of the permit was section 17 of chapter 276 of the Laws of 1834, which has since been revised and re-enacted in section 35 of the Canal Law.

The constitutional provision to which the learned justice refers is to be found in the present Constitution as section 8 of article VII, "The Legislature shall not sell, lease or otherwise dispose of the Erie Canal."

The constitutional provision, of course, prevented any permit being given by the Superintendent of Public Works which purported to give a title to the lands in question to the railroad, and it was not within the contemplation of the judicial decision that any title should be acquired. It was simply a license which, under the law, the Superintendent of Public Works could grant to it, and the value of which must be compensated for in the condemnation proceeding.

The right of a railroad company to occupy canal lands was approved by the court in *McCarty v. New York Central & H. R. R. R. Co.*¹⁰ The following is taken from the opinion:

"It does not appear by what authority the buildings and defendant's spur track were erected upon the State lands, but they have remained as now for many years.

While the Constitution prohibits the Legislature from selling or leasing the Erie canal (Const. of 1894, art. 7, § 8), yet the Superintendent of Public Works is given supervisory power over these lands, and of any railroad within ten rods

10. 73 A. D. 34; 76 N. Y. Supp. 321.

of the canal 'to preserve the free and perfect use' of the canal (Laws of 1894, chap. 338, § 25) which implies that a license or privilege may be accorded to a railroad company to construct its tracks and operate its cars within the blue line, but under the direction of the State authorities. We must assume, therefore, that the defendant is not a trespasser in running along next to the berme bank at this place."

Chapter 276 of the Laws of 1834, although an act to incorporate a particular railroad company, contained in Section 17 thereof a provision requiring the written permission of the Canal Commissioners to construct the railroad of said company over or at any place within ten rods of any canal or feeder belonging to the State, and also gave the Canal Commissioners general and supervisory power over "any railroad" passing over any canal or feeder belonging to the State or approaching within ten rods thereof.

Attention was called to these two provisions in *N. Y. C. & H. R. R. Co. v. State*.¹¹ It was held that the written permission of the Canal Commissioners required as a condition precedent, applied only to the corporation created by that act.

This decision points out, however, that the General Railroad Act of 1850 provided that every company formed under the Railroad Act of 1850 should be subject to the powers vested in the Canal Commissioners by the Act of 1834, but that in 1890 the Act of 1850 was repealed. The provisions of the Act of 1834 were in 1890 embodied in Section 13 of the Railroad Law.

It is, therefore, of importance to determine whether the necessity of obtaining the written permission of the Canal Commissioners, prior to the time they were superseded by the Superintendent of Public Works and thereafter the written permission of the Superintendent of Public Works and the Canal Board, existed at the time a particular railroad was built over or in proximity to a canal or feeder.

In *People v. N. Y., O. & W. R. R. Co.*,¹² the statute of 1850 was involved, and the New York Central decision was there cited.

11. 37 A. D. 57; 55 N. Y. Supp. 685; *af. but modified*, 177 N. Y. 577.

12. 133 A. D. 476; 117 N. Y. Supp. 1048.

It does not appear that the predecessor of the defendant company had secured the consent of the Canal Commissioners to build its original bridge in 1869, or to reconstruct same in 1876 (and 1886) over Fish Creek in Oneida County, but it did appear that the Legislature of 1869 by special act (Chapter 84) had authorized the construction of the bridge.

In an opinion rendered by Attorney General Theodore E. Hancock to the Superintendent of Public Works, July 24, 1895, the Act of 1834 was referred to, as well as Chapter 338 of the Laws of 1894, which repealed the same, substituting Section 25 of the Act of 1894 for Section 17 of the Act of 1834. The opinion is to the effect that the Superintendent of Public Works under the Act of 1894, has general supervision over any railroad passing over any canal or feeder belonging to the State, or approaching within ten rods thereof, and that this includes street and electric railways.

On August 7, 1907, Attorney General William S. Jackson rendered an opinion to the same effect.

By Section 33 of the Transportation Corporations Law, it is provided that any tramway constructed by a corporation organized for the purpose of constructing, maintaining and operating an elevated tramway for the transportation of freight in suspended buckets, cars or other receptacles, may cross the canal, but that such tramway shall be constructed so as not to interfere with the free use of such canal for the purposes for which it was intended.

By Section 44 of the Transportation Corporations Law, it is provided that no pipe line shall be constructed upon or across any of the canals of this State except by the consent of and in the manner and upon the terms prescribed by the Superintendent of Public Works, nor shall such pipes be laid through or along the banks of any of the canals of the State except in a manner approved by the Superintendent of Public Works.

From the foregoing it appears:

1. That at the present time, railroads including street and electric railways may pass over any canal or feeder belonging to the State, or approach within ten rods thereof only on the written permission of the Superintendent of Public Works and of the Canal Board.

2. That the consent and approval of the Superintendent of Public Works is necessary as to pipe lines and tramways.

3. In the absence of any other specific statutory provisions, the Superintendent of Public Works under his general powers and duties, would have supervisory control and the power and authority to make necessary rules and regulations for the safe and speedy navigation, protection and maintenance of the canals and structures thereof, subject to any approval of the Canal Board which may be required.

F. RULES AND REGULATIONS.*

The Superintendent of Public Works has prepared rules and regulations which are in pamphlet form and which contain references to and quotations from the Constitution and laws under which he is authorized to act, including the following:

1. Removal of encroachments (§ 85 of the Canal Law).
2. Obstruction of navigation (§ 182 of the Canal Law).
3. Wharves and basins (§ 185 of the Canal Law).
4. Driving on towpaths or over bridges (§ 186 of the Canal Law).
5. Floating elevators (§ 189 of the Canal Law).
6. Injuries to canals (§ 463 of Penal Law).
7. Drawing water from canals (§ 464 of Penal Law).
8. Trespasses on canal lands (§ 466 of Penal Law).

Privileges in connection with canal lands are covered by regulations numbered 71 to 81 inclusive, which may be found herein, and are designated as "Appendix V."

It is to be noted that the written permission applies as well to feeders as to canals, and the question has arisen as to whether a particular stream or body of water is a canal feeder, if it is one of the sources of the water used for the purposes of supplying the canal. This question was before the court in the New York Central case above referred to.¹⁸

* See also, B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 931.

18. 37 A. D. 57; 55 N. Y. Supp. 685; 177 N. Y. 577.

Fifth. Powers of Canal Board.***A. GENERALLY.**

The powers of the Canal Board are defined by Section 15 of the Canal Law, to which reference is made. The Canal Board is also given power to grant permission for the erection of structures for commercial or manufacturing purposes, as provided by Section 16 of the Canal Law, as follows:

§ 16. *POWERS TO PERMIT ERECTIONS FOR COMMERCIAL OR MANUFACTURING PURPOSES. The board may grant permission, on such terms and conditions as it deems proper, for the erection of warehouses, mills or other buildings for commercial or manufacturing purposes upon any dam, pier, mole or other work erected by the board or by the superintendent of public works in any canal, lake, river or other body of water, and for the use of such an amount of water power created by such dam, pier, mole or other work as may, in the opinion of the board, be so erected and used without injury thereto, and without detriment or obstruction to the public use thereof, or to the navigation of such canal, lake, river, or other body of water; such permission, except in the case of the pier in the Niagara river at Black Rock, shall be granted only to the owner of the land from which the water to be used flows, or the owner of the land adjoining the river or other stream or water at the place where such dam, mole or other work is erected.

Such permission shall be by resolution of the board, entered at full length in the minutes, including all the terms, conditions and stipulations which the board deems expedient, and a written lease in duplicate shall be executed in conformity to such resolution, by the comptroller, on behalf of the state, and by the lessee; one of such duplicates shall be deposited in

* The Canal Board is composed of the following State officers: Lieutenant-Governor, Secretary of State, Comptroller, Treasurer, Attorney-General, State Engineer and Superintendent of Public Works.

See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 934.

* So in original.

the office of the comptroller and the other delivered to the lessee.

Every such building shall be erected at such point, on such plan and not exceeding such dimensions as the superintendent of public works specifies, by a minute in writing, recorded at full length in his office, a copy of which, certified by him, with a written assent of the lessee indorsed thereupon or annexed thereto, shall be filed in the office of the comptroller before the delivery of the lease. The board may also with the consent of the superintendent of public works grant permission for the use of any of the state lands adjoining any reservoir or of any island or islands in any reservoir as a public pleasure resort, and for the erection of buildings thereon, upon such terms, conditions, covenants and restrictions as the board may deem proper.

B. SURPLUS WATERS,* WASTE WATERS, WATER POWER.

As water power becomes more and more an important economic factor in producing electrical energy, the value of surplus waters, as a result of or in connection with the construction, maintenance and operation of the canals, becomes likewise more important. The power of the Canal Board and the Superintendent of Public Works relative to the disposition of surplus waters may be found in Article VII, Sections 100-111 inclusive, of the Canal Law, to which reference is made. It is to be noted that such waters may be used only when the use will be "without prejudice to the canal." In other words, there must be a "surplus" and there may be no individual use of waters if such use will interfere with the operation of the canal and leave an insufficient supply of water for such operation.

No lease of surplus waters may be made unless the lessee is the owner of the land over or upon which surplus waters may flow or unless the lessee has the consent of the owner of such lands.

The constitutionality of the right to take waters from a feeder of the Erie Canal and conduct them to the City of Syracuse was considered in *Sweet v. The City of Syracuse*, 129 N. Y. 316, above

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 964.

referred to. This case was twice argued before the Court of Appeals and two exhaustive opinions were written. Several very important principles as regards the rights of the State and individuals relative to waters were considered although all were not directly involved. A review of some of these is merited. It appears that in 1843 the Canal Board by legislative authority, appropriated the waters of Skaneateles Lake and the outlet thereof to the use of the public for a reservoir and feeder to the Erie Canal; thereafter the flow of the water into the outlet was regulated by a dam and gates, since operated by an employee of the State; a portion of the water flowing through this outlet was discharged into the Erie Canal at a point about nine miles from the lake. The other portion which was not discharged into the canal continued to flow by means of an aqueduct beneath the canal through its natural channel into the Seneca River; in 1889, the Legislature authorized the City of Syracuse to take and conduct water not required for the Erie Canal from such lake to the city for the purpose of supplying it with water; before so doing, however, the city was required to increase the storage capacity of the lake sufficiently to store therein all the ordinary flow of its watershed; the Superintendent of Public Works was given exclusive control of the dam and structures referred to; he was authorized to stop the flow to the city of Syracuse if the supply for the use of the canal became impaired; the rights of the city to use surplus waters were subject to the superior claims of the State thereto. The action was brought by a taxpayer of the city to restrain it from carrying the act into effect, on the ground that the Constitution forbade the sale of the canals and waters required for the use thereof, and that the act *granted* waters of the State without a two-thirds vote of the Legislature.

This decision illustrates the doctrine that in theory there can be no *surplus canal waters*, and, therefore, the State would have no surplus canal waters to lease. This theory, as has been pointed out, results from the limited powers of the appropriating State officer who can appropriate only so much water as is *necessary* to carry out the plans of the undertaking then being developed. The defendant contended that although there had been an appropriation by the State of "the waters of the lake, and the outlet

of the same," such appropriation did not constitute an appropriation of more of the waters of the lake than were actually necessary for the uses of the canal. On this theory, the grant to the City of Syracuse was in effect not a grant of property, but only an agreement between the State and the city, whereby the city was bound to respect the prior rights of the State if the city took waters from the lake. There was not a grant of canal waters; the Legislature simply recognized the fact that the State either had not acquired the right to take, or did not need all of the waters discharging from the lake.

Although in theory an appropriating officer would not have the right to appropriate the entire discharge of a lake for canal purposes when one-tenth thereof would supply the canal requirements, and although he may be enjoined from so doing should he endeavor to appropriate all, however, if he should appropriate all and should all property rights with reference thereto be extinguished and paid for, the State would undoubtedly be entitled to the use of the full discharge. Thus having the right to use all of the discharge, the State would have surplus canal waters which could be sold and utilized. After utilization for canal purposes waters may be termed *waste waters*.

Waters which the State is entitled to use for canal purposes, but which are not required by reason of an over-sufficiency, are surplus waters. Waters which are discharged from a canal at a given point to prevent general overflowing of the banks are waste waters.

The State might appropriate a large area, an entire watershed, construct a dam and impound water and regulate its flow through a natural channel or outlet to the canal. By so doing, it may not damage any lower riparian owner. In fact, a lower riparian owner may be benefited by a more equal flow of water. But the lower riparian owner is only entitled to have the water flow in its natural state. The State may, in accomplishing the storage, build a dam from which it may divert water from its natural channel, or it may make use of the natural channel. In either event, it would not be necessary for the State to acquire title to the land under the natural channel. But if the State did acquire

land under the natural channel, and did permit the water to flow therein, the State would then have surplus *water power*.

The distinction should not be lost sight of that the State may appropriate the right to take and divert running water at a particular point from a stream, or the State may acquire a large area of land and impound and regulate the flow of the water so impounded. In the first instance, it may do no damage to any property owner above the point of divergence; below the point of divergence, the extent of damage would depend on the quantity of water diverted, or rather on the quantity of water which the State had the right to divert.

Although in theory the State should take only the right to divert so much waters as may be needed for canal purposes,—in practice it would be impossible in many instances to determine the required quantity of water to a certainty. In such a case, it may be within the power of the appropriating officer to appropriate the right to take and divert all of the water discharging from a natural lake, or to impound it by artificial means and divert it, or to take and divert all of the water flowing in a natural stream. With the change of seasons and rainfall, the State would require and use more or less of the waters, the right to divert which it has acquired. At times there may be a very substantial flow in the old channel below the point of diversion. These, strictly speaking, are surplus canal waters. They are legally so and not the result of a State officer exceeding his power in appropriating; not more waters than necessary, but the result of changing weather conditions which cannot be foreseen.

There may be surplus waters which the State would have the power to dispose of separate and distinct from canal waters, although related as a result of a canal improvement. The State may own the bed of a stream which may be navigable in fact or in law, capable of developing water power. The Legislature might authorize the construction of a dam in the stream and a utilization of the water power by an individual, making proper regulation for public travel. Or the State may develop the stream for canal purposes, and in so doing, build a dam across the stream with a lock on one end. After such improvement, the State may grant the right to utilize the waters flowing over the dam and not required

for the operation of the canal within the river bed and the lock at the end of the dam. The waters so flowing over the dam may be termed surplus waters. They are simply the waters to the use of which the State was entitled before the canal improvement subject to possible riparian rights of adjacent owners, and which are not required in carrying out the improvement and in operating the canal.

It, therefore, appears that the State may have title to or the right to take and use:

1. Waters generally.
2. Waters not required for navigation in a particular lake or stream. (These may be termed surplus waters.)
3. Waters appropriated for canal purposes, all of which are not required for canal purposes at all times, or which may not be actually conducted to the canal channel and used therein. (The part not so required or used may be termed surplus canal waters.)
4. Waters used in and discharged from the canal. (These may be termed waste waters.)

In addition to the foregoing, the State may have the right to develop water power on lands appropriated by it, which lands are crossed by a stream developing power, or on which may be located a body of water, the discharge from which creates power.

These distinctions are recognized in part in Sections 100 to 111 of the Canal Law above referred to, although the surplus waters therein mentioned are in relation to canal developments:

1. Section 100 of the Canal Law is general;
2. Section 103 refers to surplus water which shall be "created;"
3. Section 105 mentions a reservation on the part of the State of water for canal purposes;
4. Section 107 relates to water "taken from any canal;"
5. Section 111 authorizes the Superintendent of Public Works to lease surplus water arising from the enlargement of the canals.

The question of what are surplus waters and the respective rights of the State and the individual thereto are closely related to the ownership thereof, or the right to use same and the various uses which might be made thereof. The following may be involved and it should be determined:

1. Whether the bed of the lake or stream is owned by the State or by an individual or individuals.
2. Whether the same is navigable or non-navigable.
3. Whether navigable in fact or in law, or both.
4. Whether there has been an improvement in navigation in a navigable stream, or the creation of a canal.
5. Whether the State has proceeded under its original rights or after appropriation from individuals.

The State can only lease waters which it has the right to control or use.

Some of the foregoing questions were considered by the court in *Sweet v. The City of Syracuse*,¹⁴ above cited, although they were not directly involved as it appeared that the act under which the city was operating required it to furnish from other sources as much water as it should take from the lake. The court did hold, however,

1. That the State had not and could not acquire title to the aggregated drops which comprise the mass of flowing water in the lake and outlet.
2. That the State could acquire the right to divert and use same for the operation of the canal. This use might require the diversion of all the water stored in the lake.
3. That assuming the State still retains its original proprietary right to the waters and the bed of the lake, it would have no greater right to use or divert same than any other riparian owner.
4. That if the State had not retained its original proprietary right, it possessed only what it had acquired by appropriation for canal purposes.

14. 129 N. Y. 316.

5. That if the State owned the soil of the bed of the lake, such ownership was subject to every easement and servitude necessary to the use of the water by other riparian owners, that is, the owners of the lands adjoining the lake.

Following the re-argument, the opinion of Judge Earl is to the effect that the provisions as to the taking of water by the city were ample to secure to the State all the water supply it can need from the lake "at all times." This presents the inquiry as to whether an appropriation of waters for canal purposes refers to existing conditions of navigation, or whether under the appropriation the State may in the future take more water for an enlarged canal and thus reduce the supply of surplus waters. The answer would be that whatever waters the State had the right to take and use for canal purposes, it had the right to withhold from one claiming same under a lease of surplus waters. In addition, it was the duty of the State to withhold such waters when needed for canal purposes.

An opinion of the Attorney General rendered in the year 1900 is to the effect that the State has the right to use as much of the waters of the Mohawk River as is necessary for its canal system and that, if required, it may use all of the waters of the Mohawk River in the building and maintaining of enlarged canals, notwithstanding the fact that there had been granted to the Cohoes company the right to erect and maintain a dam above the Cohoes Falls and to divert waters therefrom by means of canals.

Attention was called to the fact that the courts had held that riparian owners along the stream were not entitled to damages for any diversion or use of the waters of the Mohawk River by the State. The legislative provisions under which the Cohoes company took waters from the Mohawk River were construed as privileges or licenses and denoted a "precarious privilege" to be enjoyed at the will of the State. This was so even though the City of Cohoes obtained its water supply from the Mohawk River through the medium of the Cohoes company.

Other opinions of the Attorney General relative to the use of surplus waters may be found, including the question of leases of

such waters, effect thereof, reservation of rent, possession and enjoyment or nonenjoyment of the privilege granted and cancellation of leases.¹⁵

The last opinion cited considers the subject quite at length and reviews several of the principles involved and some decisions affecting same.

An early decision relative to the effect of a lease of the waters of the Oswego River is that of *Varick v. Smith*, cited in *F. L. H. & P. Co. v. The State*, 200 N. Y. 400, at page 414. The lease was made in 1827 and purported to lease all the waters of the Oswego River not needed for canal purposes. Under this lease, Smith claimed the right to divert all of the waters to the east side of the river and thus leave Varick on the west side of the river without any water supplying Varick's mill. The court held that the State did not own or control the surplus waters and that it could not lease them to Smith to the damage of Varick.

If the State could not divert waters for canal purposes without liability, it could not lease same to an individual—it would have no surplus waters to lease.

The greatest right the State can have in and to the waters of a lake or stream is when it owns the underlying fee and the fee of the lands bordering same, in its original proprietary right, and when the lake or stream is not a public highway or navigable. This same right or ownership may be acquired by appropriation. The State may drain the lake or stream dry without any liability or permit others to do so.

If the lake or stream is a public highway, the right of the public must be preserved and are superior to the rights which any individual may acquire under a lease of waters.

But assume that the State does not own the lands bordering on the lake or stream. Then can the State lease the waters or those not needed for canal purposes and can the lessee draw off the waters to the injury of the owner of the bordering lands?

Under the *Sweet* case the rights of the owner of the bordering

15. See opinions of Attorney-General Julius M. Mayer, April 27, 1905, and July 26, 1905.

lands are secure; as a riparian owner he is entitled to use the waters in various ways. *Danes v. State* above cited¹⁶ was not a case involving surplus waters but did affect the rights of a riparian owner. Danes did not own the bed of the Mohawk River, as was held, but he owned lands bordering on same. The State had the greatest possible title and right to the river and in addition appropriated a strip along the shore line and made it impossible for Danes to use the Mohawk River in connection with lands not taken and which were cut off from the river by the strip so taken. The Court of Appeals remitted the matter to the Court of Claims to determine the damages sustained by reason of the interference of the "ordinary riparian rights" through such taking.

Following the trial in the Court of Claims, an opinion was written by Judge Fennell of that court, which made an award for loss of ordinary riparian rights. The opinion contains the statement that there are ordinary riparian rights on navigable streams where the State owns the fee of the land under water. *Rumsey v. N. Y. & N. E. R. R. Co.*,¹⁷ is cited as authority. A distinction is pointed out between a case where the State owns the bed of the river, which it improves for navigation without taking any bordering lands, and a case where the State does take bordering lands. This distinction is discussed at length in *Sage v. Mayor*.¹⁸

That the State has the right to improve the navigation in a navigable river and to dredge the channel and to deposit material along the shore upon land under the waters of the river in front of and adjacent to the upland, even though the upland owner is damaged thereby, is unquestioned.¹⁹

But for the State to draw off the waters from a navigable lake or stream, even for the purpose of using same in operating a canal, without liability to the riparian owners, or to lease same and permit an individual to divert such waters as surplus waters, is a different proposition.

A lease of surplus waters was considered in *People v. Free-*

16. 219 N. Y. 67.

17. 136 N. Y. 543.

18. 154 N. Y. 61.

19. *Slingerland v. International Contracting Company*, 169 N. Y. 60.

man.²⁰ It was held to be valid and binding on the State: that a forfeiture might be declared for nonpayment of rent, but until such forfeiture has been enforced and so long as the lessee remains in full occupation an absolute forfeiture will not be declared; that neglect to pay rent was not an abandonment of the lease and while the lessee continued to use the water he was liable for the rent. The rights of the State and the lessee to surplus waters are quite fully discussed and set forth.

A person who takes waters from the canal without a lease has no rights which will be respected by the courts.²¹

The purpose of this discussion on surplus waters and the reference to the rights of the owners of the fee to lands underneath and bordering waters is to call attention to the fact that lessees should determine whether there are surplus waters, *i. e.*, whether the State has the right to lease certain waters as surplus waters and whether the State can give to the lessee the right to take and divert same without liability to any individual. This is highly important if the lessee intends to use such water in connection with an expensive power development or for use in a manufacturing plant where no other waters are available.

As a result of the recent construction of the several Barge Canals and the utilization of lakes, rivers and other streams, navigable and unnavigable, and the storage of water and the conducting of same through feeders to the canals, there is to-day much surplus water, surplus canal water, waste water and water power, which may be utilized. Notwithstanding Section 111 of the Canal Law, which authorized the Superintendent of Public Works, with the approval of the Canal Board, to lease any surplus waters of the canal arising from the enlargement or the improvement of the same, Chapter 494 of the Laws of 1907, being an act to amend Chapter 147 of the Laws of 1903, which was the act providing for the improvement of the Erie, Oswego and Champlain canals, prohibited a lease until the improved canals shall have been finally

20. 110 A. D. 605; 97 N. Y. Supp. 343.

21. *Beekman v. Jones*, 42 A. D. 328; 59 N. Y. Supp. 138.

completed. This act was amended, however, by Chapter 38 of the Laws of 1919, which reads as follows:

§ 16. The waters, surplus or otherwise, created or impounded as a result of the improvement of the Erie, Champlain and Oswego canals, pursuant to the provisions of this act, or from the construction of any dam or dams, mole or moles, reservoir or reservoirs, or other structures, connected therewith, shall not be leased, sold or otherwise disposed of, until the improvement of said canals as contemplated in this act, and amendments thereto, shall have been finally completed, nor thereafter until authorized by statute setting forth specific terms, conditions and restrictions governing the same. Nothing in this act shall be construed as preventing the superintendent of public works, with the approval of the canal board as provided in section one hundred and eleven of the canal law, from leasing water to be drawn by pipes from either of such canals for purposes other than the development of power, if such water is to be immediately returned to such canal at approximately the same point from which it is withdrawn, and if the drawing of such water will not interfere in any way with the navigation or operation of such canals.

CHAPTER X.

Barge Canal Lands.

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 - (c) As to Tenant in Common.
- Second. Cayuga and Seneca Canals.
- Third. Terminals.

By Chapter 411 of the Laws of 1900, the State Engineer and Surveyor was directed to make surveys and plans for improving the Erie Canal, the Champlain Canal and the Oswego Canal. The route of the improved canals was specified in general.

First. Barge Canal Law.*

The next step taken by the Legislature was the enactment of Chapter 147 of the Laws of 1903, commonly designated as the Barge Canal Law, and hereinafter referred to as such. Provision was made for issuing bonds not to exceed \$101,000,000 for the improvement of the Erie, Champlain and Oswego Canals. This act was submitted to the people to be voted upon at the general election held in 1903 and approved.

This submission to the people was in accordance with Article VII, Sections 2 and 4, of the Constitution of the State of New York, which provide that the State may not contract debts exceeding \$1,000,000 until the law shall have been submitted to the people at a general election and have received a majority of all votes cast for and against it at such election. Being a so-called referendum act, it was not subject to amendment by the Legislature so as to materially increase the obligation. It could, however, be amended in matters of detail.

The referendum act did not specifically provide for the appropriation of existing bridges and franchises but did provide that new bridges should be built over the canals to take the place of existing bridges wherever required. It was the evident intention not to take away from the owners of bridges the right to maintain same or to collect toll for crossing same and thus incur obligations on the part of the State and resultant damage claims for franchises destroyed.

A. AMENDMENTS.

Notwithstanding, an amendment was made in the year 1913. Chapter 801 of that year provided for the appropriation of existing toll bridges, together with all franchises for the construction and

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 877.

maintenance of same and the right to take toll thereon; that in the event a new bridge shall be built over the canals it shall be a public free bridge.

This act was before the court in *Halfmoon Bridge Co. v. Canal Board*.¹ The court held that the Act of 1913 was not within the power of the Legislature to enact; that it was in direct conflict with the constitutional provision.

The provision of the Constitution referred to² is to the effect that the Legislature may, after the approval of a referendum act by the people, repeal the same if no debt has been contracted or may at any time forbid the contracting of any further debt or liability under the law. In other words, the Legislature may provide for carrying out the general scheme and plan submitted to the people within the amount approved by the people. It has no power to exceed that amount or change the plans so as to produce such a result or to provide for the taking of property not contemplated under the referendum act. So long as the general plan is carried out, the Legislature may direct a change in matters of detail, assuming such a direction to be necessary and not within the contemplation of the referendum act.

As to what is a matter of detail or as to what constitutes a change which the Legislature is empowered to make may be a question of fact requiring the construction of the court.

To summarize:

1. The Legislature has no power after the adoption of a referendum act to amend same by providing for the acquisition of more property than contemplated by or necessary to carry out the purpose of the act, or to substantially alter the plan and purposes of the act.
2. The same limitations rest upon the appropriating officer.
3. The referendum act may specifically provide for and authorize the Legislature, or some State official or board, to amend the plans generally provided for by the referendum act.
4. In the absence thereof, the appropriating officer may have the inherent power to change plans when, in his judgment, it would be to the advantage of the State and facilitate

1. 91 Misc. 600; 155 N. Y. Supp. 602.

2. Article VII, Section 4.

the work of the improvement without incurring additional expense. Physical conditions may be found to be such that it would be impossible to carry out the work at a designated location or, if possible, not advisable on account of the disproportionate expense.

5. Should the appropriating officer not be willing to assume the responsibility of making such a change, the Legislature may authorize and direct same without violating the provisions and requirements of the referendum act.

6. Even though a referendum act is approved by the people, the Legislature may never start the work or, if started, it may stop it before completion.

7. A public improvement under a referendum act may incidentally benefit a city or village along the route designated in the act. It is not for the benefit of any individual or locality but rather for the benefit of the people of the State generally.

8. Referring specifically to the Barge Canal Act, it appears (Section 3) that although the routes as specified shall be accurately laid down upon the ground by the State Engineer, he is authorized and required to make such deviations as may be necessary or desirable to produce certain specified results or generally for any purpose tending to improve the canal and render it safer and easier for navigation. It thus appears that the specific directions as to details of construction may be ignored by the State Engineer under certain circumstances. A change in route may be made so that the improvement will be moved farther from one city or village and nearer to another, without any liability.

B. ROUTE OF CANALS.*

The Barge Canal Law specified the route of the Erie Canal: Beginning at Congress Street, Troy, passing up the Hudson River to Waterford; thence connecting with the Mohawk River by a series of locks; thence following the Mohawk River generally to a point about six miles east of Rome; thence down the valley of

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. I, p. 979.

Wood Creek to Oneida Lake; thence through Oneida Lake to the Oneida River, following the same to the Seneca River; thence up the Seneca River to Onondaga Lake; thence following the Seneca River and after leaving same provision is made for a new channel to a point near Clyde; thence following substantially the present route of the old Erie Canal to Fairport; thence on a new location crossing the Genesee River south of Rochester; thence following substantially the route of the old Erie Canal to the Niagara River, following the same.

The route of the Oswego Canal was defined as following the Oswego River and the old Oswego Canal.

The route of the Champlain Canal followed the Hudson River from Waterford north to Fort Edward; thence following the route of the old Champlain Canal to Lake Champlain.

It thus appears that the Barge Canal was to be built as follows:

1. Partly by utilizing existing lakes.
2. Partly by canalizing existing rivers and creeks.
3. Partly by digging a channel in a new location.
4. Partly by following the old channels of the old canals after widening and deepening same.

The work outlined necessitated:

- (a) Making connection with lakes and rivers and building dams and lakes; also,
- (b) The deepening and widening of existing river and creek channels; also
- (c) The acquisition of lands through which new sections of the canal might be dug or to enable the widening of then existing canals and for the deposit of spoil; also
- (d) The flooding of lands as a result of building such dams.

Subsequent amendments to the Act of 1903 changed the locks at Waterford (Chapter 740, Laws of 1905); changed the route near Clyde and the requirements at Rochester, Lockport and Buffalo (Chapter 710, Laws of 1907); changed the Syracuse harbor (Chapter 508, Laws of 1908).

C. APPROPRIATION OF LANDS AND WATERS.*

As stated, the Canal Law (Section 80) provides that the Superintendent of Public Works may appropriate lands, structures and waters for the use of the canals. The Barge Canal Act is a special act and took away from the Superintendent of Public Works the power of appropriation, or rather it conferred the power of appropriation on the State Engineer (Barge Canal Law, Section 4). This act was amended from time to time, providing at one time for an Advisory Board of Consulting Engineers (Chapter 394, Laws of 1907, and Chapter 196, Laws of 1908), which Board was abolished in 1911 (Chapter 736, Laws of 1911).

In general, the State Engineer was authorized to enter upon, take possession of and use lands, structures and waters, the appropriation of which, for the use of the improved canals, was in his judgment necessary.

Before such entry, however, the following steps were required:

1. An accurate survey and map to be made by the State Engineer.
2. Certificate of State Engineer that lands, waters, structures and appurtenances therein described are necessary for the use of the canals.
3. Approval of map, survey and certificate by Canal Board.
4. Map, survey and certificate to be filed in office of the State Engineer.
5. Duplicate certified copy thereof to be filed in office of the Superintendent of Public Works.
6. Notice of such filing to be served by Superintendent of Public Works upon the owner of any property so appropriated.

These steps completed the appropriation and made an entry upon the lands described in the map lawful.

D. WHEN TITLE VESTS IN STATE.

Although the entry upon, possession and use of the lands, structures and waters and the appropriation thereof by the State were

*See generally, Nichols on Eminent Domain, 2d Ed.

by the terms of the act "deemed complete," the act did not specifically provide that title thereto should thereupon vest in the State. The question arose as to whether title vested in the State before payment by the State or before the amount of compensation had been determined and the right to receive same fixed.

Under the early canal acts, although the appropriation, that is, the authority to enter upon and take possession of the land, became complete prior to payment, title did not vest in the State until payment or until an appraisalment of the damages.³

The particular acts governing the appropriation of lands for canal purposes are as follows:

(a) Section 3, Chapter 262, Laws of 1817.

(b) Section 52, Chapter IX, Title IX, Revised Statutes 1829.

(c) Section 73, Chapter 338, Laws of 1894, which is now Section 83 of the Canal Law.

LAWS OF 1817.	LAWS OF 1829.	LAWS OF 1894 TO DATE.
"The fee simple of the premises, so ap- propriated,	"The fee simple of all premises so appro- priated,	"The fee title to all real property permanently appro- priated,
	in relation to which, such estimate and appraisalment shall have been made and recorded,	for the use of the Canals of the State,
shall be vested in the People of this State."	shall be vested in the People of this State."	shall be vested in the People of this State."

It has been held in *People v. Adirondack Railway Company* (160 N. Y. 225), that title vested in the State upon the completion

3. *Baker v. Johnson*, 2 Hill 342.

People v. Hayden, 6 Hill 359.

Rexford v. Knight, 15 Barb. 627; af. 11 N. Y. 308.

Birdsall v. Cary, 66 How. Pr. 358.

Ballou v. Ballou, 78 N. Y. 325.

Mark v. State, 97 N. Y. 572.

of the appropriation, regardless of the time of paying, in construing a statute which specifically so provided.

It was not until 1916 that the Court of Claims was directly met with the question as to when title to lands appropriated for Barge Canal purposes vested in the State. The Court of Claims in two opinions, one affecting lands taken for Barge Canal purposes and another affecting lands taken for terminal purposes, held that although the entry may be lawful and the appropriation be deemed complete for that purpose, title would not vest in the State until:

- (a) Compensation had been made, or
- (b) Judgment entered in the Court of Claims, or
- (c) Agreement had been made with proper State officials, or
- (d) Statute of limitations had run.

The Appellate Division in *Kahlen v. State*, in 181 A. D. 961, affirmed the Court of Claims, but the Court of Appeals in 223 N. Y. 383, held that where the act was silent as to the time of the vesting of title, title would vest when there was a right of entry; that the right of entry existed on the completion of the appropriation; that the appropriation is deemed complete from the time of service of the notice of appropriation; that under the statute service of the notice of appropriation is "the vital act appropriating the lands for which the state must pay."

The rule as previously stated in *State Water Supply Com. v. Curtis*, 192 N. Y. 319, is as follows:

"If, therefore, the statute be taken to authorize the appropriation of lands and the permanent occupation thereof by the state water supply commission (that is to say, the permanent occupation thereof as distinguished from the temporary occupation merely for purposes of preliminary survey, etc.) without previous payment of the fair value thereof to the owner as ascertained either by agreement or fixed in condemnation proceedings, it must necessarily be condemned as in conflict with the fundamental law."

E. DESCRIPTION AND ESTATE TAKEN.*

Under the heading "Appropriation of private property" it was pointed out that there must be authority for taking private property for public use and that the Legislature might delegate to a State officer the right to determine the *necessity* for taking; also that the Legislature may provide the *method* of taking.

As noted, the first step in the appropriation is the making of an accurate survey and map of all such lands, waters, structures and appurtenances. There shall be annexed a certificate of the State Engineer that the lands, waters, structures and appurtenances "therein described" are *necessary* for the use of the canals.

A description is provided for, and the necessity for same has been emphasized by the courts on several occasions. Not only is a description necessary but the interest appropriated must be determined and stated.

To quote from *People v. Fisher* (190 N. Y. 468, 478):

"When lands are appropriated the quantity must be definitely ascertained and described, so that the owner may know how much he has lost and what he is entitled to be compensated for. (*Hayden v. State of New York*, 132 N. Y. 533, 536.) It is not only necessary that the boundaries and quantity of the land be ascertained and described, but the interest therein appropriated by the state must also be determined and stated for the purpose of ascertaining the compensation to which the claimant is entitled. * * * If a continuous easement and not the fee of the land is appropriated it should be so stated."

In *People ex rel. N. Y. C. R. R. Co. v. Walsh* (211 N. Y. 90), Judge Collin, in the opinion, alluded to the fact that the Canal Law contained no provision as to the interest or estate to be taken; that the requirement of the revised and anterior statutes that the State should take the title in fee simple of the lands appropriated

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 20, p. 368. State takes fee.

See generally, Nichols on Eminent Domain, 2d Ed.

B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 835.

was omitted; that instead thereof it had been enacted that "The title to all real property permanently appropriated for the use of the canals of the state shall be vested in the people of the state." He further stated, in substance, that the term "real property" includes "real estate, lands, tenements and hereditaments, corporeal and incorporeal" or "any right, interest or easement therein or appurtenances thereto;" that the law is satisfied by the appropriation of an easement adequate for the use necessitating the taking; that this is likewise true as to the term "land" or "lands;" that under the Barge Canal Act the State Engineer was authorized to determine not only the lands, structures and waters, but also the estate or interest therein required in making the improvement directed.

Although the question before the Court of Appeals, in *Hayden v. State* (132 N. Y. 533), arose before the adoption of the Barge Canal Act, it illustrates the proposition that a description must be specific and certain. In 1867 the Canal Board, by resolution, permanently appropriated "the water and lands necessary" for a feeder to the Erie Canal, the water appropriated being the outlet of Lake Owasco. The court held that to make a legal and permanent appropriation of land or water for the use of the canal the quantity must be specifically described, continuing:

"If the water to be appropriated is described as *all* in a certain lake or all flowing in a particular stream, such would undoubtedly be a sufficiently definite description. But in this case the resolution did not state that *all* of the water of the outlet, or that any particular quantity or part of it was appropriated, and the description was too indefinite to effect a legal appropriation."

Hayden v. State was approved by the Court of Appeals in *Bell Telephone Company v. Parker* (187 N. Y. 299). Although an appropriation for canal purposes was not before the court but instead a description of lands taken under the Condemnation Law was under review, the principle is the same.

1. *Lands Bounding Highways and Waters.**

The land as described on maps made by the State Engineer and appropriated for Barge Canal purposes very frequently borders upon a lake, stream or highway. This presents the question as to whether there is an intention to appropriate any of the lands under the waters of the lake or stream or within the highway and whether the description carries to the center of the lake, stream or highway. Some of the descriptions specifically include such lands, although the diagram on the map does not.

As the courts have so frequently held that an appropriation is a sale, if the same rules which are applicable to a sale are to be applied to an appropriation, many of the appropriations may include land under water or within a highway.

Gouverneur et al. v. N. I. Co. (134 N. Y. 355) is authority for the rule of law that there is a presumption in this State that lands under the waters of small inland, non-navigable ponds and lakes or fresh water streams, pass under a conveyance of the adjoining uplands unless by express words or by other facts a contrary intent may be implied. It appeared that the owner of a tract of land, on which there was a natural pond or lake, covering about forty-five acres, conveyed this land in five separate parcels by five separate deeds, which did not specifically include the lake. The opinion of the Court of Appeals is to the effect that the same legal construction should be given to grants of land bounding lakes and ponds as is given to grants of land bounding on fresh water streams, although to that time (1892) the court's attention had not been called to any case in this State where the question had arisen and been the subject of determination. Reference is made to *Canal Appraisers v. People* (17 Wend. 597) (which should probably read page 571) which is authority for the rule that a grant of land by one who owns lands along a stream navigable or non-navigable, and who also owns the land under water, carries title to the land under water unless specifically excluded; that a different rule would prevail as to the large navigable lakes which are inland seas and also as to lakes and streams forming national

*See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 5, p. 409; Bk. 8, p. 42; Bk. 18, p. 283; Bk. 21, p. 846; Bk. 24, p. 458; Bk. 28, p. 881; Bk. 34, p. 653.

boundaries. The opinion reviews the authorities not only in this State but several other States.

It was held in *Van Winkle v. Van Winkle* (184 N. Y. 193), that a deed of lands bordering a highway will, if the grantor owns to the center of the highway, carry same although the deed gives the boundaries by courses and distances without specifically including or mentioning the street by which the same is bounded; that it is the same as though the boundary were described as running through the center of the street.

The *Gouverneur* and the *Van Winkle* cases were followed by the Appellate Division, Fourth Department, in two actions brought by *The Land and Lake Association v. Conklin and Beardsley*, reported in 182 A. D., at pages 546 and 550, respectively. It was held that where the grant is framed so as to "touch the water" the title of the land underneath to the center passes to the grantee under the grant; that if the parties mean to exclude it same should be expressly excepted; even the fact that the acreage mentioned in the description is not sufficient to cover the land under water does not overcome the presumption that title to the land under water passed; that the same was true with reference to a road which skirted the edge of the lake, the boundary of the road being the boundary of the lake as well; that even the mention of the word "side" of the lake would extend to the center of the lake.

This presumption applying to a grant or deed may not apply in case lands under water or within the highway are not necessary for the use of the canal. The necessity which limits the power of the appropriating officer may prevail and thus make the rule inapplicable. Whether or not an actual entry is made on the land under water or within the bounds of the highway, or whether there is an actual taking of same in connection with the land shown on the diagram forming part of the map, would have a considerable bearing.

2. *Temporary Appropriations.**

An opinion, by Attorney General Woodbury, rendered to the State Engineer, February 9, 1915, covers the question of the

* See generally, Nichols on Eminent Domain, 2d Ed.

estate which may be taken or appropriated and discusses so-called temporary appropriations. A concrete wall had been built in the bed of a stream, separating the stream from lands and buildings adjoining. The level of the stream had been raised and water seeped under the wall and into the basements of adjoining buildings. The opinion of the Attorney General is to the effect that the State Engineer may make a temporary appropriation of land or appropriate such an easement or other right, title or interest therein as, in his judgment, is necessary for the purposes of the improvement; that under the circumstances the State is authorized, as a matter of law, to appropriate only the right to enter upon the upland and to deposit spoil or other suitable material thereon to the elevation of the water on the opposite side of the wall, or to any other elevation, in such manner as will prevent seepage or percolation of water from the dam to said premises; that by such an appropriation authority will be obtained for the entry upon the premises and the making of a fill sufficient to prevent flooding and resulting damages, but not without liability by reason of such entry and the use made of the property.

Thus, it appears, that the State may appropriate not only an estate, right or interest less than a fee but it may appropriate same for a limited period. The period or time of occupation should, however, be specified.⁴

Previous to the rendering of this opinion and the decision in *People ex rel. N. Y. C. R. R. Co. v. Walsh* (211 N. Y. 90), the power of the State Engineer to appropriate less than a fee had not been approved or was not considered as existing for, by Chapter 468 of the Laws of 1911, specific authority was given to the State Engineer to make a temporary appropriation. This specific authority was taken away by Chapter 736 of the Laws of 1911.

Following the adoption of these two acts, the Attorney General rendered an opinion on June 7, 1912, and again on June 3, 1913, to the effect that no authority existed for the making of temporary appropriations of property in connection with the work of improving the canals under the Barge Canal Act prior to the adoption of Chapter 468 of the Laws of 1911; that by Chapter 736 of

4. *Spencer v. State*, 194 A. D. 79.

the Laws of 1911, the provisions for making temporary appropriations were repealed; that after such repeal no authority existed for the making of temporary appropriations for Barge Canal purposes; that such an attempted appropriation, although ineffectual and inoperative to vest title in the State, nevertheless would effect a cloud upon the title of the owner thereof.

In view of the later decision of the Court of Appeals, these earlier opinions of the Attorney General may not be considered authoritative excepting to the extent that a temporary appropriation, unless definite as to the purpose and specific as to time, may, under the authorities above cited, be considered illegal and so declared by the court.

F. CERTIFICATE OF NECESSITY.

The certificate that the lands or estate taken and described are necessary must be made by the State Engineer. This act on the part of the State Engineer is judicial and not ministerial and must be performed by him in person. This was so held by the Court of Appeals in *Ontario Knitting Co. v. State* (205 N. Y. 409). A certificate had been signed by the Special Deputy State Engineer. The first question presented was whether the Special Deputy could make the certificate and, assuming it to be the act of the State Engineer, the next question was whether the lands appropriated were necessary within the scope of the plans provided for by the Canal Board. Judge Haight, in the opinion referring to the powers granted to the State Engineer to make appropriations, stated:

“As we have seen, by the provisions of the statute quoted, the state engineer was authorized to take possession of such lands for the purposes of the canal as ‘shall in his judgment be necessary.’ Here we have an extraordinary power vested in the engineer to appropriate the lands of private individuals. If in his judgment he deems such lands necessary for the purposes of the canal, the exercise of his judgment is, in its character, judicial and not ministerial. It is a power that has been delegated to him by the people of the state in electing him to the position, and it is his judgment and discretion

that they rely upon in exercising the functions of his office. He, therefore, could not delegate such power to a subordinate appointee unless he was in plain terms authorized so to do by the legislature."

Continuing further, the opinion states that the certificate appropriating lands to the use of the State is required to be made by the Engineer himself and becomes "the vital act appropriating the lands for which the State must pay."⁵

In determining the necessity of taking any particular parcel of land for the use of the canals, the State Engineer is governed and controlled by the maps, plans and specifications adopted by the Canal Board. Unless a particular piece of land is necessary for the purpose of carrying out such plan, it is not necessary and the State Engineer is without proper authority to appropriate it. To again quote from the opinion of Judge Haight:

"We think that the lands for canal purposes could not be taken by the engineer until the canal lands had been located by the canal board and the plans for the improvement of the canal had been approved; for prior to such location and adoption of plans, it could not well be determined as to what land would or would not be necessary for canal purposes." * * *

"Our conclusion is that the engineer exceeded his authority, and that consequently his acts were void."

A contrary conclusion was reached by Judge Haight while acting as official referee in *Pratt v. State*. His opinion is reported in 2 State Dep. Rep. 356. He distinguishes the facts involved from those in the *Ontario Knitting Co.* case and says:

"In this case the plans recommended have been approved by the Superintendent and the Canal Boards, possession of the property appropriated has been actually taken, the contract for the improvement under the plans adopted has been let and the work thereunder principally performed. I therefore

5. Note that the Court of Appeals in *Kahlen v. The State*, 223 N. Y. 383, held that the service of Notice of Appropriation was "the vital act appropriating the lands for which the State must pay."

conclude that notwithstanding the fact that the Deputy Engineer exceeded his authority in signing the certificates, still the appropriation was authorized and his acts have been ratified and confirmed by the State in its taking possession of the parcels appropriated."

G. APPROPRIATION OF FIXTURES.*

In considering an appropriation and the estate taken there may also be involved the question as to whether property which if detached would be personal property, but which, by reason of being affixed to real property, loses its character as personal property and becomes a fixture, has been appropriated. The State appropriated a warehouse containing machinery, shafting, elevators and conveyors annexed to the warehouse. In *Jackson v. State* (213 N. Y. 34), the machinery, shafting, elevators and conveyors were considered fixtures and the court held that by the appropriation of the warehouse the fixtures were also appropriated. "An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures." The court intimated that the appropriation may be "qualified when made," but if that be done the purpose must be made plain in the act of appropriation. It appeared that after the appropriation some of the fixtures were removed by the owner and by common consent treated as personal property.

The line of demarcation as to when an article may be treated as real property or as personal property is sometimes so slight as to be difficult of determination. Such a question was presented and considered by the Court of Claims at length in *Phipps v. State* (127 N. Y. Supp. 260). This was a case where land on which there was a factory had been appropriated. The owner had previously placed an engine in the factory and set up a derrick in the earth. The court held that the engine and derrick constituted "fixtures" and were part of the realty and that they had been appropriated in connection with the appropriation of the land and factory.

* See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 22, p. 536.

A "fixture" may be a chattel physically affixed or annexed to real estate so as to become a part thereof and the property of the one owning such real estate; or

A "fixture" may be a chattel physically affixed or annexed to real estate, but which remains the property of the one affixing it and may be afterwards removed therefrom without the consent of the owner of the real estate.

Three questions are important:

1. Manner of annexation.
2. Adaptation to the use of that part of the real estate to which it is annexed.
3. Intention of person annexing whether or not to make the article a permanent part of the real estate.

Of course it is always possible that the rights of third parties may intervene and affect somewhat the intention and acts mentioned.⁶

The more recent appropriations contain a clause to the effect that all fixtures, machinery or appurtenances which may be deemed as fairly removable remain the property of the owner and are subject to his disposition.

H. APPROPRIATION OF PERSONAL PROPERTY.

Assuming that an article may be considered personal property, may an appropriation be broad enough to include personal property?

It was held, in *United Traction Co. v. Ferguson Contracting Co.*,⁷ that the only authority for the appropriation of personal property is the implied authority found in Section 13 of the Barge Canal Act. In other words, personal property would not and could not be appropriated by the State Engineer under the provision authorizing him to enter upon, take possession of and use lands, structures and waters. But there may be an actual physical appropriation of personal property by the State or one

6. *Realty Associates v. C. C. Corp.*, 185 A. D. 464; 173 N. Y. Supp. 25.

DeBevoise v. M. A. Const. Co., 228 N. Y. 496.

7. 117 A. D. 305; 102 N. Y. Supp. 190.

acting under State authority. This was held in *Watson v. Empire Engineering Corporation*,⁸.

I. GENERALLY.

It, therefore, becomes important in the examination of any map, certificate and description prepared by the State Engineer to determine whether the description is specifically stated and the estate defined; also whether the intention of the State Engineer is clearly expressed; also whether the certificate is in proper form and the lands necessary. In the construction of the Barge Canals, the boundaries of the appropriated lands have not always been defined on the ground, fences have not generally been built, encroachments will grow from year to year as they have in the past unless there is a vigilant patrol by those having charge of the canal lands. Any one occupying or assuming to take a conveyance which may include lands or waters appropriated for canal purposes does so at his peril and without securing title thereto.

J. MAPS AND WHERE FILED.

The State Engineer has prepared approximately 5,500 maps describing lands, waters and structures required for the purposes of Barge Canal construction. Many of these maps involve several parcels of land. The land affected extends from the Niagara River on the west to the Hudson River on the east; northerly to Lake Champlain and Lake Ontario; southerly to Seneca and Cayuga Lakes. These maps describe:

1. Lands above water;
2. Lands covered by water;
3. A right to flood or overflow lands;
4. Water rights;
5. Right to maintain railroad or other bridges at a specific elevation;
6. Right to maintain transmission lines, telegraph lines, telephone lines or other structures.

Every character of interest is involved, which can only be determined by a careful examination of each map and description.

8. 77 Misc. 543; 137 N. Y. Supp. 231.

The approval of a map by the Canal Board is the next requisite step, after which it shall be filed in the office of the State Engineer. These maps may now be found on file there and consulted.

A duplicate certified copy is required to be filed in the office of the Superintendent of Public Works.

K. SERVICE OF NOTICE OF APPROPRIATION.

Service upon the owner of any property so appropriated, of a notice that a map has been filed, is the next requirement. The notice must "specifically describe that portion of such property belonging to such owner."

1. *Owner — Who Is?**

The Superintendent of Public Works is charged with the duty of determining and locating the owner of property required. The act does not define the word "owner."

Section 3358 of the Code defines the term "owner" as any person having any estate, interest or easement in the property to be taken or any lien, charge or incumbrance thereon.

In the light of Judge Collin's opinion in *People ex rel. N. Y. C. R. R. Co. v. Walsh* (211 N. Y. 90), that any such estate, interest or easement may be appropriated, service on the owner of same would be required.

An owner as defined by Section 3358 of the Code has been held to include a lessee of condemned premises in a case where a lease had not expired and the unexpired term was two years.⁹

(a) Generally.

The term owner, as used in some of the early railroad acts, was held to designate the parties entitled to the compensation which is substituted for the land taken; all persons having proprietary interests are entitled to compensation, for the aggregate of those interests constitute the ownership or fee; tenants for years are owners; also those having franchises. But a judgment creditor of an owner was held to have no estate or proprietary

* See Weed's Practical Real Estate Law, p. 901.

9. *People v. Thornton*, 122 A. D. 287; 106 N. Y. Supp. 704.

CODE references. See Author's Note and Distribution Table — page xxiv.

interest in the land; a judgment creditor stands upon the law which simply gives him a remedy for the collection of his debt by a sale of the land under execution, if sufficient personal property cannot be found to satisfy same; the remedy is not secured by contract but is purely statutory; the Legislature may abolish the lien of a judgment at any time before rights become vested or estates acquired under a judgment. A lien of a judgment not ripened into a title by sale of the land may be superseded by the appropriation of the land; compensation may be made to the owner of the land. These conclusions are gathered from the opinion of Judge Rapello in *Watson v. N. Y. C. R. R. Co.* (47 N. Y. 157). They were commented upon, with approval, by Judge Vann in *People v. Adirondack Railway Co.* (160 N. Y. 225, 243). In the last case mentioned it was held that the filing of a map and service of notice upon occupants, by a corporation organized for the purpose of constructing a railroad, did not create a lien or right in the nature of a lien in favor of the railroad company which would entitle it to a notice of appropriation by the State.

(b) Lessee.

A case which arose directly under the Barge Canal Act is *United Traction Co. v. Ferguson Contracting Co.*¹⁰ It was held that an entry for the purpose of constructing the canal without the service of a notice on the owner or lessee of a railroad company would entitle the lessee to an injunction restraining any interference with the structures or rights of the lessee.

A tenant in possession of real property, under a lease, for six years was held to be an "owner" under the Barge Canal Law, in *Baker v. State* (63 Misc. 549). This is a Court of Claims decision, which was shortly thereafter followed by another Court of Claims decision¹¹ which held that a lease is an incumbrance.

(c) Licensee.*

The rights of one who had erected a saw mill within the "blue line" of the old Erie Canal, *i. e.*, on canal lands, were considered

10. 117 A. D. 305; 102 N. Y. Supp. 190.

11. *Moroney v. State*, 67 Misc. 58; 124 N. Y. Supp. 824.

* See Weed's Practical Real Estate Law, p. 681.

in *Watson v. Empire Engineering Corporation*.¹² Although it was not held that a notice of appropriation should be served on the owner of a saw mill, it was held that such owner was a licensee and that he was entitled to a notice to remove the mill from State lands; otherwise he would be entitled to compensation for the destruction of same.

(d) Dower.*

The rights of one having a dower interest in lands appropriated for canal purposes, especially an inchoate right of dower, under the Barge Canal Act, do not appear to have been passed upon by the courts. Assuming that a notice of appropriation should be served on other than the fee owner, there arises the question as to whether notice should be served on one having a dower interest. This interest may arise in three different ways:

1. After the death of the husband, after dower has been assigned as referred to by Section 1604 of the Code of Civil Procedure. (Section 468, Real Property Law.)
2. After the death of the husband, before dower has been assigned.
3. In case dower is inchoate, which condition is the most common.

As early as 1839 the first question was considered in a case where the husband had died and the widow was entitled to dower.¹³

In either of the first two cases mentioned the authorities indicate that the wife has a vested estate.

Moore v. Mayor (8 N. Y. 110) is authority for the conclusion that an inchoate right of dower exists as an incident to the marriage relation; that it is not an estate but a mere contingent claim; that where lands are taken by a municipal corporation for a public use, pursuant to an act of the Legislature, title is

12. 77 Misc. 543; 137 N. Y. Supp. 231.

* See also NOTE, N. Y. Ct. of Ap. Rep., (Bender Annotated Ed., Bk. 2, p. 312. See Weed's Practical Real Estate Law, p. 381.

13. *Matter of William St.*, 19 Wend. 678.

secured, divested of any inchoate right of dower existing in the wife of the fee holder. This case was cited apparently with approval where lands were appropriated by the State, but not for canal purposes.¹⁴ It was again cited as recently as 1914 in *Rumsey v. Sullivan*,¹⁵ where the rights of one having an inchoate right of dower were considered somewhat at length.

In *re New York and Brooklyn Bridge*,¹⁶ the rights of the husband and wife were directly involved in a proceeding for the acquisition of real property by eminent domain. The wife had not been served with notice. The court stated the rule:

“Where real property belonging to a married man is taken for a public purpose by the exercise of the right of eminent domain during the coverture. * * * an absolute title is acquired, divested of any inchoate right of dower existing in his wife. So much is fundamental, resulting from the nature of the proceedings, and the theory upon which the power of the sovereign to condemn private property for a public use is based. That theory is that the people, in their right of sovereignty, are deemed to possess the original and ultimate property in all lands within the jurisdiction of the state, and may resume the possession again to meet public necessities. That was also the decision of the court of appeals in the case of *Moore v. Mayor, etc.*, 8 N. Y. 110.”

Other authorities are cited to the effect that the theory stated is not always applicable and that the *Moore* case is sometimes limited in its operation, so that the *Moore* case stands “as an authority only as between the wife and the state and its delegates.”

Thus it appears that the rule laid down in the *Moore* case is still in force as an authority in case lands are appropriated by the State.

A widow has been held to have no right of dower in land in which her husband has only a vested remainder expectant upon an estate for life.¹⁷

14. *People v. A. R. Co.*, 160 N. Y. 225, 45.

15. 166 A. D. 246; 150 N. Y. Supp. 287.

16. 75 Hun 558; 27 N. Y. Supp. 597.

17. *Durando v. Durando*, 23 N. Y. 331.

(e) Contra.

Notwithstanding the foregoing definitions of the word "owner" as used in the Barge Canal Act and the decisions referred to, an opinion by the Attorney General dated April 1, 1913, is to the effect that a service upon the owner of the fee constitutes a compliance with the statute and appropriates all lesser interests; that no service is necessary upon the holders of any easement or encumbrance. Under the opinion, an easement is held to be an encumbrance. The easement under consideration was a grant obtained by a transportation company of the permanent right to maintain poles and wires upon lands required for Barge Canal purposes. Such interest, while it was considered property, was not considered such property or ownership in lands as to require service of a separate Notice of Appropriation within the provisions of the Barge Canal Law.

2. *How Notice Served.*

The Superintendent of Public Works is required to serve the notice of the filing of the map, survey and certificate in his office either

(a) "Personally within the State," or

(b) If he "shall not be able to serve said notice upon the owner personally within the State after making efforts so to do which in his judgment are under the circumstances reasonable and proper, he may serve the same by filing it with the Clerk of the county wherein the property so appropriated is situated."

There is no specific provision in the act that the notice must be *directed* to the owner and such a direction may be unnecessary in case of personal service. It is to be presumed that the person served, if the owner of the property described in the notice, will realize the intention to appropriate and that his property has been appropriated.

The question has arisen as to when a service need not be personal, or, in other words, when there may be a substituted service of notice by filing in the County Clerk's office. Certain owners of lands located in Montgomery County were either nonresidents of

the State or a foreign corporation. Notices directed to such owners were not served personally, but were served upon someone who was not connected with the foreign corporation and who did not represent the nonresident individual. They were also filed in the County Clerk's office of that county. In *Gring v. American Pipe & Construction Co.*,¹⁸ the court held that the service on an individual not connected with the company and not representing the individual owner was undoubtedly ineffectual, but that the filing in the County Clerk's office was effectual and constituted a proper service. This decision was affirmed¹⁹ without opinion. The contention was made that the superintendent should have filed in the County Clerk's office, together with the notice, a certificate that he was unable to serve the notice upon the owner personally within the State after making efforts so to do, but the court held that the statute did not require such a certificate; that the mere filing of the notice by the superintendent was evidence of what his "judgment" in the matter was. The service as made by filing was held to be proper and to have completed the appropriation and vested the State with the right to enter upon, take possession of and use the lands described, leaving the owner thereof to his remedy to prosecute his claim for such appropriation as provided by the Barge Canal Act.

The notice having been properly directed and filed, there was a compliance with the act and this decision has been followed as the law governing services of notices under the Barge Canal Act, although the Court of Appeals has not squarely passed upon the question.

Matter of City of New York (212 N. Y. 538) did not involve an appropriation of lands for canal purposes, but the opinion of Judge Cardozo is of interest. A statute under which the fee of lands was taken for street purposes was under consideration. The statute provided for the filing of a map. To quote from the opinion:

"It does not require that owners be notified of the filing of the map by which their rights are to be extinguished.

18. 74 Misc. 570; 132 N. Y. Supp. 545.

19. 151 A. D. 910.

It does not confine itself to a provision that the filing of the map shall *ipso facto* work an appropriation of their interest in the land. That in itself would not, we may assume, be invalid if an adequate remedy insuring compensation were provided. The statute, however, goes farther and declares that the mere lapse of six years, following the filing of the map, shall, regardless of notice to the owners, bar their right to compensation. It does not avail them that they have remained in undisturbed possession of their lands and unchallenged enjoyment of appurtenant easements. If they fail to keep track of the maps that define the public highways, their private as well as their public easements may be forfeited without requital. All this is true, if the statute be valid, though neither by actual nor by published notice have they been advised that their rights have been placed in jeopardy. I do not think that such a statute comports with the constitutional guaranty of due process of law." * * *

"Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the State. He cannot be charged with the duty of hunting out the facts for himself. The State is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention." ²⁰

Reference has already been made to the fact²¹ that notice is a "means of knowledge."

3. *Effect of Service.*

Assume that a notice is directed to A on the assumption that he is the owner of the lands described on the map filed in the office of the Superintendent of Public Works;

20. See also *Matter of City of New York*, 219 N. Y. 399.

21. *Matter of U. E. R. R. Co. of Brooklyn*, 112 N. Y. 61, 75.

- (a) That there are easement rights affecting such lands; or
- (b) That A is not in fact the owner of all such lands; or
- (c) That A is a tenant in common, owning only an undivided interest in such lands;

that personal service is not made on A but that the notice is filed in the County Clerk's office of the county where such lands are situated, then a query is presented as to whether such service is effectual as against:

- (a) Such easement owners, or
- (b) The owner of the portion of such lands not owned by A, or
- (c) The other tenants in common.

(a) Easement Owner.*

Under the opinion of the Attorney General of April 1, 1913, that "the filing of the notices and survey in the County Clerk's Office where the property is located, is constructive notice of the appropriation to all persons having any interest in the lands," such filing would be sufficient to constitute an appropriation of the easement right. The Gring case is cited, but this case is not authority for such a conclusion, as the point was not involved. There was no question of the rights of an easement owner.

Merchants' Line v. Walsh Construction Co.,²² was an action to which the State was not a party, but involves the effect of a service of a notice of appropriation. Personal service of the notice was made upon an owner, although it does not appear to whom the notice was directed. A duplicate of the notice, with an affidavit of such service, was filed in the County Clerk's office. The court held that such filing was apparently to comply with the provisions as to unknown owners "and owners upon whom the Superintendent of Public Works was not able, in his judgment, after making reasonable and proper effort so to do, to serve such notice personally. The act specifies no other reason for such filing. So far as the record discloses no personal service of said

* See Weed's Practical Real Estate Law, p. 397.

22. 174 A. D. 327; 160 N. Y. Supp. 796; 167 N. Y. Supp. 1113.

notice" was made on a lessee. The court overlooked the distinction made in the act that a *notice* when not personally served may be served by *filing* in the County Clerk's office while *proof of service* of notice on an owner may be made by causing an affidavit of service to be *recorded* in the County Clerk's office. The *service* by filing and the *proof of service* are two separate and distinct acts.

(b) Part Owner.

Syracuse L. S. & N. R. R. Co. v. State²³ is a recent decision involving an appropriation of lands assumed to be owned by one Thorne, whereas Thorne had previously conveyed to the railroad company. Notice of the appropriation was served upon Thorne, but no notice was served upon the railroad company. The State took possession of the lands described without objection of the railroad company. Thereafter two maps were filed in the office of the Superintendent of Public Works, one showing lands owned by Thorne, and the other showing lands owned by the railroad company, and the superintendent caused to be served upon the railroad company the usual notice of appropriation. The State contended that the original appropriation was never completed because it had mistakenly included lands of the railroad company in the survey describing lands of Thorne; also that the State had not served a notice of appropriation upon the railroad company in the first instance. The State's contention was not sustained on the ground that the railroad company had acquiesced in the first attempted appropriation by the State, had waived all irregularities and yielded possession to the State; that the State could not take advantage of its own mistake; that the State was liable to the railroad company as of the time of the original attempt to appropriate.

The decision does not hold that the notice directed to and served upon Thorne in the first instance constituted an appropriation of land owned by any one other than Thorne, *i. e.*, land of the railroad company, but is based upon the acquiescence of the railroad company and on the fact that both the State and the railroad

23. 175 A. D. 264; 161 N. Y. Supp. 477.

company treated such service as an appropriation of lands of the railroad company.

(c) Tenant in Common.

In connection with the construction of the storage reservoir at Hinckley on West Canada Creek, certain lands were required which were owned by three tenants in common. A notice of appropriation was served on one tenant in common but not on the other two until six or seven years later. The effect of the service of notice on the one tenant in common was considered by Judge Vann, as official referee, and his opinion is reported in Volume 14-15, Court of Claims Reports, page 95 (Hinckley v. State). The opinion, in part, follows:

“The filing of the map, description and certificate and the service thereof on one or more of the claimants as tenants in common, but not upon all, affected a tentative appropriation, which became complete by service on the others at a later date, but, by operation of law, the later service related back to the earlier and the appropriation is regarded as having been made at that time. The service, whenever made, was part of one transaction and service on a single tenant in common paralyzed the action of all, for the property could not be improved except at the owners' risk or sold except at the owners' sacrifice. It would be against equity for the State to claim that it did not take the property until the last service was made, when the delay of years in completing service was wholly its own fault and it had certified on the map filed at the initiation of the proceeding that the property was necessary for a public improvement, and that it had been permanently appropriated therefor, which involved and finally resulted in the acquisition of every interest in the land. Moreover the property was at once entered upon and taken possession of by the State and the construction thereon of a huge dam for a reservoir was begun, after due preliminary investigation and preparation. Such possession has continued ever since, the dam has been completed and the early proceedings have been adopted and confirmed by the subsequent action of the State and its duly authorized officers. This

conclusion is now important only with reference to the question of interest and to the effect of a subsequent conveyance by the claimants."

See, also, *Ametrano v. Downs* (170 N. Y. 388), where one tenant in common was not a party to a condemnation proceeding. Held that the proceeding was without force or effect as to her, but that her voluntary acceptance of the award estopped her from claiming the land taken.

The cases above cited are all cases where the service was personally made on the "owner" instead of by filing. If the notice is directed to and served upon "A" personally and no one else, the effect should be the same as if the notice was served by filing.

These cases should be like authority whether service is made personally or by filing.

Second. Cayuga and Seneca Canals.*

Following the so-called Barge Canal Law of 1903, Chapter 391 of the Laws of 1909 provided for the issuance of bonds not to exceed \$7,000,000 for the improvement of the Cayuga and Seneca Canals. This act was submitted to the People to be voted upon at the general election held in 1909 and approved. The provisions of the Barge Canal Law of 1903, and the acts amendatory thereof and supplemental thereto, so far as they relate to the appropriation of land for canal purposes, are made to apply and govern the work authorized by the act.

This act, like the Act of 1903, is for the "improvement" of then existing and known canals and not for the building of a new and independent system of canals. An opinion of Attorney General Edward R. O'Malley, dated February 19, 1909 (page 475), is to the effect that whenever the improvement acts are silent as to any act to be done, the provisions of the general statutes governing the canals are applicable.

The route of the Cayuga Canal follows the course of the Clyde River, the valley of the Seneca River, and Cayuga Lake to Ithaca.

The route of the Seneca Canal follows in part the route of

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 914.

the old Seneca Canal, Seneca Lake to Watkins, thence following the Chemung Canal to the Village of Montour Falls. Provision for a divergent route at Geneva was also made.

The authorities and opinions above referred to under the Barge Canal Law relative to amendment of the act, vesting of title, description and estates taken, service of notice of appropriation and effect thereof, are likewise applicable to the Cayuga and Seneca Canals.

Third. Terminals.*

The so-called Terminal Act is Chapter 746 of the Laws of 1911. It provided for the issuance of bonds not to exceed \$19,800,000 for the purpose of furnishing terminals and terminal facilities for Barge Canal traffic. The act provided for the location of terminals at Buffalo, Tonawanda, Rochester, Lyons, Syracuse, Oswego, Utica, Rome, Troy, Albany and at various intermediate places. In general the act required the terminals to be located at a particular point in these cities.

Approximately 20 terminal sites were designated in the City of New York, with more or less particularity as to exact location. The first terminal mentioned was to be known as The Port of Call — “a terminal to be known as The Port of Call may be constructed” are the words of the act.

The lands described were appropriated by the State Engineer, who later concluded that same were not suitable for a Barge Canal terminal. His authority to so conclude was questioned, with the result that the matter finally reached the Court of Appeals. The following is from the opinion in *Kahlen v. State* (223 N. Y. 383):

“The Barge Canal Terminal Act is not mandatory in its direction as to the establishment of a Port of Call on the property appropriated — (Section 6 and 9). The location thereof might be changed by the Canal Board upon the recommendation of the State Engineer.”

The State Engineer was authorized to enter upon, take possession of and use the lands, structures and waters in the same way

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 998.

that he was authorized to take lands for the canals above mentioned, excepting as to lands located in and owned by the City of New York. Such lands could not be appropriated, but title thereto could be acquired only by an agreement between the City of New York, acting through its Board of Estimate and Apportionment, and the State, acting through the Canal Board, with the approval of the Governor.

Although specific locations in the City of New York were named in the act as well as "alternative locations" or "other locations" as near as possible to those in the first two classifications, under the authority of the Kahlen decision, such locations by the Legislature were not controlling on the State Engineer and Canal Board. Although the Legislature with quite a deal of particularity recited locations on which terminals "may" be constructed, it further provided that "the Canal Board, upon the recommendation of the State Engineer, may modify, re-design or change any of the structures or terminals or re-locate the same within any of the cities, villages or towns, specified in this Act" (Section 9).

The title to several parcels of land formerly owned by the City of New York was acquired by agreement with the City of New York; the title to other lands was acquired through the service of the usual notice of appropriation.

All of the sites named in the act were not appropriated or improved. Some sites not named in the act were acquired and improved.

Terminal sites have also been secured under a special act (Chapter 555 of the Laws of 1918) in the cities of Poughkeepsie, Newburg, Kingston and Yonkers.

CHAPTER XI.

Highways.*

- First. Generally.
- Second. State Highways.
- Third. Railroad Grade Crossings.
- Fourth. As a Result of Canal Construction.
- Fifth. Summary.
- Sixth. Property Within Highways.

First. Generally.

The ownership of lands embraced within existing highways often comes in question as between individuals, or as between a municipality and an individual, but not so often as between the State and individuals. So long as lands within the bounds of a highway are burdened by public easements and the highway is being maintained by public officials and the general public is travelling the highway, the value of the fee ownership is nominal. No one is then especially concerned as to the fee ownership. But if a highway is altered or discontinued, or if the lands embraced within same are appropriated for some other purpose or are to be burdened by the construction of a railroad and the laying of railroad tracks or the erection of elevated structures, poles, wires, etc., the fee ownership of the lands within a highway may become of value and such ownership may have to be determined.

Prior to the origin of the State government large tracts of land had been granted as already stated, and some of the early highways had already been laid out over lands so granted as well as over ungranted lands.

As to lands granted before the origin of the State government, unless the letters patent granting same contained an exception of the fee of lands embraced within then existing highways, the State took no title thereto.

As to lands granted after the origin of the State government,

* See Weed's Practical Real Estate Law, p. 1004.

reference has been made to the reservation of five acres of every hundred acres for highways and to the opinion of the Attorney General that the State did not thereby except a fee but reserved an easement only for highway purposes.¹

Some of the highways first laid out were known as turnpikes and post roads, regardless of the ownership of same. The "Albany post road" is still recognized as such by statute. It is "the old established road along the valley of the Hudson river from the city of New York to the city of Albany." Section 343 of the Highway Law provides that this road shall be a public highway for the use of the travelling public forever and that no railroad tracks shall be laid upon such highway, except across the same. This section refers to the maintenance and use of the road rather than to the ownership of the lands embraced within same.

In addition to turnpikes and post roads, plank roads and toll roads have been established from time to time but have gradually been abandoned under the present system of improving highways.

Highways or public highways, as they are more properly called, were known to the common law and included rivers and canals. Following the growth and establishment of villages and cities the term highways has been construed to include streets.

Under the common-law definition of a public highway, it embraced lands over which the public at large had the right to travel on foot or horseback or by means of vehicles; also rivers and canals on which the public had the right to travel by means of rafts or boats.

Unless otherwise provided, the lands embraced within the bounds of highways shall be deemed to be two rods wide.

Section 209 of the Highway Law provides that all lands which shall have been used by the public as a highway for a period of twenty years or more shall be a highway with the same force and effect as if it had been laid out and recorded as a highway, and that the town superintendent shall open all such highways to the width of at least two rods.

Section 200 of the Highway Law requires new highways to be laid out not less than three rods in width.

1. See "Appendix I."

On March 3, 1910, the Attorney General rendered an opinion to the State Highway Commission relative to the power and authority of the Commission and the local authorities to remove obstructions where the boundaries of the highway are not definitely established. The opinion points out that under the Colonial Laws of 1703, highways were laid out four rods in width and descriptions thereof were required to be filed in the county clerks' offices. Since the passage of Chapter 166 of the Laws of 1821, highways were required to be laid out at least three rods in width. The opinion continues as follows:

"Where a highway has been dedicated to the public for the prescribed period of twenty years or more, the town superintendent may cause the survey to be made thereof and remove fences or other encroachments within the limits of such highway, and the adjacent owner has not become vested with any rights within the bounds of the highway, as against the public, to defeat such a remedy. (*James v. Sammis*, 132 N. Y. 239, 248).

"The failure of the town authorities to cause a public highway long in use to be opened to its full width, for thirty years, does not extinguish the rights of the public in the parts not opened. (*Walker v. Caywood*, 31 N. Y. 51.)

"User for twenty years will make a road a highway with or without dedication. (*Town of Corning v. Head*, 86 Hun, 12; *Wiggins v. Talmadge*, 11 Barb. 457; *Chapman v. Swan*, 65 Barb. 210.)

"If a record can be found the road should be opened up to the width provided in such record, but if no record can be found, all encroachments and other obstructions should be removed to the width of at least two rods, as directed by Section 209 of the Highway Law, and if it can be shown by record, by location of fences, or otherwise, that the road is more than two rods wide, all encroachments within the bounds that can be established should be removed."

Three Colonial patents granted in or about the year 1680, after describing the lands granted, contained provisions to the effect that eight rods in breadth by the water side should be left

for a highway. It was contended in *Lembeek et al. v. Rosenstein*² that this constituted an exception of an eight-rod strip, the title to which passed to the State of New York on the origin of the State Government. The court held that the fee was not excepted; that it passed to the patentee; that a right of public passage for highway purposes only was reserved and that the patentee took subject to such reservation. Thereafter, under the Colonial statutes of 1703 and 1704, the "Great Road" in Richmond County was created with a breadth of four rods and "Lesser Roads" in said county were created with a breadth of three rods. In 1705 there was laid out by legal proceedings, duly recorded, a public highway three rods wide, which was later reduced in width to two and one-half rods. The court held that there was an abandonment by the sovereign of its right of user to five rods and that same reverted to the patentee.

A grant of lands by the State by letters patent, which lands are shown on a map and indicated thereon as a subdivision or lot by number, abutting a highway, was held by the Court of Appeals to grant the fee title to the center of the highway; that this is the rule as against the State as well as against a private grantor, even though the area conveyed would not be sufficient to include the area embraced within the highway, and even though the highway shown on the map has not been used as such by the public.³

If lands are dedicated to the public for use as a highway and used as such, a later nonuse of the whole or a portion of such highway, if the highway shall remain closed with the acquiescence of the public for a period of six years, will extinguish the right of the public to use same as a highway. Obstructions of a highway which narrow and reduce its width, but which do not close the line of travel, no matter how long continued, do not put an end to the existence of the highway. To have that effect, the entire width of the highway must be obstructed. If a highway is obstructed for its entire width, the portion so obstructed ceases to be a highway, even though other portions are open and used for travel.

2. 168 A. D. 563; 153 N. Y. Supp. 999.

3. *Geddes Co. v. N. L. & O. P. Co.*, 207 N. Y. 500.

These rules apply in case the public have an easement only, the fee ownership being in an individual; they have no application where the fee is vested in the public — the State.⁴

“But this rule does not extend to a mere encroachment. No encroachment, however long, destroys the public easement. Even an obstruction which makes the highway impassable for vehicular travel may not effect an abandonment if enough of the highway is left open and in such a condition as to permit pedestrians to travel over it, and it is so used. The statute contemplates non-user of a part of the route and not merely part of the width of the highway, though it may also be applied to a case where the highway is shifted to the side, leaving only a part of the old location abandoned.”⁵

The encroachment involved in the Shipston case (the last case cited and quoted from) was held not to effect a public abandonment or public right even if consented to by the city officials. To quote further from the opinion:

“The highways of the State are held in trust, not for a particular town or municipality, but for the entire State, and that is so even in a case where the fee of the land is in the city. As was said by Judge Gray in *City of New York v. Rice* (198 N. Y. 124): ‘The ownership by the city of the fee of the land in the street is impressed with a trust to keep the same open and for use as such. The trust is *publici juris*, that is for the whole People of the State, and is under the absolute control of the Legislature; in which body, as representing the People, is vested power to govern and to regulate the use of the streets. There is no right in the city to use its property therein, as it might corporate property, nor otherwise than as the Legislature may authorize for some public use, or benefit.’”

That the State of New York has full control over streets, even those in the City of New York, and could grant rights in and

4. *Barnes v. M. R. R. T. Co.*, 218 N. Y. 91.

5. *Shipston v. City of Niagara Falls*, 197 A. D. 421; 176 N. Y. Supp. 393. See also Section 234, Highway Law.

to same without the consent of the municipality, was held in *H. E. P. Co. v. Williams* (228 N. Y. 407, 20).

Second. State Highways.*

In general the State of New York does not own the fee of lands embraced within highways unless it owns the adjoining lands, although under the present classification of highways by Section 120 of the Highway Law, certain highways therein described are denominated "State highways" which shall be constructed or improved at the sole expense of the State. This designation has no reference to ownership.

In the construction or improvement of a State highway the State Highway Commission may provide for the widening of an existing highway or for changing the line thereof as a result of which new or additional lands may be required. (See Section 125, Highway Law.)

If additional lands are required for the purpose of constructing or improving a State highway, the board of supervisors of the county where the highway is located shall acquire the necessary land for a right of way as well as lands outside of the right of way from which material may be taken. (Section 148, Highway Law.) Likewise as to county highways.

An opinion by the Attorney General to the State Commissioner of Highways, dated January 26, 1915, is to the effect that the State Highway Commission has no power to purchase lands for State highway purposes even though the land is absolutely necessary for that purpose.

Although the State may not acquire title to lands for State highway purposes, lands adjacent to a State highway may be entered upon and occupied for the purpose of opening or constructing a drain or ditch. (See Section 135, Highway Law.) The State Highway Commission may agree with the owner as to the damages caused by such entry (Section 136, Highway Law), but payment of such damages would not give the State title to the lands damaged.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, p. 3463.

The State Highway Commission may occupy lands adjoining a State or county highway and agree with the owner as to the amount of damages. In case of a State highway the damages become a State charge, whereas in case of a county highway they become a county charge.

The liability of a county as a result of constructing a county highway has even been extended to cover damages to a well located upon lands adjoining a county highway supplied by subterranean water, which became dry as a result of constructing a county highway.⁶ Had this highway been a State rather than a county highway, the county would not have been liable and the claim would not have been a county charge but rather a State charge. (See Section 136, Highway Law.)

Although the State would not acquire title to lands entered upon and occupied or damaged, it would, on the payment of damages based on the theory of a permanent right of entry, acquire the future right of entry and occupation for the purpose of maintaining a drain or ditch and would also have the right to permanently do damage such as to prevent water from supplying a well, as in the County of Erie case.

The entry upon and occupation of lands not within the bounds of an existing highway, by a State officer or agent or a contractor, in the construction of a State highway, gives the State no right in or to same and creates no liability against the State. This is for the reason that the State is not authorized to acquire title to lands necessary for State highways, but such land is to be acquired by the board of supervisors of the county in which the land is located. There can be no actual permanent appropriation of lands by the State through entry and occupation by a State officer, agent or contractor.

The power of the State is limited to the improvement of an existing highway and the construction of a highway not previously existing over lands acquired for highway purposes by the county.⁷

6. *County of Erie v. Fridenberg*, 221 N. Y. 389.

7. *Konner v. State*, 227 N. Y. 478.

Third. Railroad Grade Crossings.*

The opinion of the Attorney General last referred to⁸ states the only exception to the rule that the State does not acquire title to lands for highway purposes. This exception occurs in the elimination of grade crossings under the Railroad Law.

Section 145 of the Highway Law provides that the State Highway Commission may abolish certain railroad grade crossings on State or county highways. Sections 91-95 of the Railroad Law provide for the method of acquiring title to lands necessary to effect the abolition of such crossings. Section 92 of the Railroad Law authorizes the State Commission of Highways, in case a street, avenue, highway or road is to be constructed or improved as a part of a State or county highway, to acquire by purchase any lands, rights or easements necessary or required in order to abolish such crossings. Lands so acquired by the State Highway Commission are conveyed to the People of the State of New York.

This provision of the Railroad Law (Section 92) provides for acquisition of title by the State or by the municipal corporation having jurisdiction over the street, avenue, highway or road.

If title cannot be secured by purchase either by the municipality or the State, it may be secured by condemnation.

The property to be acquired may not be limited to that located within the boundaries of the highway, but may include rights outside of such boundaries, and the owner thereof may be entitled to compensation for interruption of access to adjoining property, or depreciation in value thereof as a result of construction or change in access.⁹

Fourth. As a Result of Canal Construction.

In the construction of the canals, and as a result thereof, it has been necessary to discontinue or alter existing highways, and to provide new highways. Sometimes a portion of a highway is

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, pp. 3509 *et seq.*

8. January 26, 1915.

9. City of Corning v. O'Neill, 180 A. D. 454; 167 N. Y. Supp. 743; af. 227 N. Y. 625.

City of Corning v. Holmes, 180 A. D. 458; 167 N. Y. Supp. 746; af. 227 N. Y. 624.

located within and a portion without the blue line, *i. e.*, a part of the highway is on canal lands acquired for canal purposes and a part on lands not acquired for canal purposes.

The early Revised Statutes made provision for altering highways.

Under the Canal Acts of 1816 (Chapter 237) and 1817 (Chapter 262) the Commissioners were authorized to enter upon and occupy any lands necessary for the canal improvement. It was held in *Rogers v. Bradshaw* (20 Johnson's Rep. 515 [735]), that if it became necessary as an incident to the construction of the canals to occupy a turnpike road, the Commissioners, or their agents, might lawfully enter on the land of a person for making a new road in the place of such part of the turnpike road discontinued by them and taken for the purposes of the canal. The Commissioners, or their agents, were not trespassers for entering upon and occupying the land before compensation had been made.

In the year 1865 the Court of Appeals in *Higgins v. Reynolds* (31 N. Y. 151) considered the rights of the State in relocated highways. The following taken from the opinion very clearly covers the question of the power of the State to appropriate, and the rights of the State after appropriation of such lands:

“ This land, over which the altered road was located, outside of the boundaries of the appropriation for the canal enlargement, was never appropriated in such a manner as to divest the plaintiff of his title. This portion of the plaintiff's lands was never appropriated by the Canal Commissioners for the purpose of the canal enlargement. The portion appropriated for that purpose was indicated upon the map made in pursuance of the statute, a transcript of which was used in evidence. (1 R. S., p. 218, § 4.) To that portion of the plaintiff's land included within the boundary lines, as designated upon that map, the State had acquired the fee simple and the plaintiff had become divested of his entire title. (1 R. S., p. 226, § 52.) At least the plaintiff claims nothing within those boundaries. The State had become vested with the plaintiff's title to all the land, including that covered by the highway within those boundaries. But it had not and has never acquired the title in fee simple, to any of the plaintiff's lands outside of those boundaries.

The statute (1 R. S., p. 221, § 19) authorizes the Canal Commissioner in charge of the work of constructing or repairing or improving any canal, to discontinue or alter any public highway whenever it interferes with the proper location or construction of such work. Sections 20 and 21 provide the manner and form in which such discontinuance and change of location shall be made. But in exercising this power of altering a highway, the Canal Commissioner obviously does not exercise the power of appropriating lands within the meaning of the statute, so as to divest the owner of his title and vest it in the State. No power is given to a Canal Commissioner to appropriate lands for the mere purpose of a common highway. It is a power given to be exercised as subordinate or auxiliary, merely, to the main power to construct, repair or improve a canal. This auxiliary power is of the same nature and kind precisely with that exercised by highway commissioners in the discontinuance and alteration of highways; and the highway, when altered by the Canal Commissioner instead of the commissioner of highways, and changed to another location, would be nothing more or less than a common highway as it was before. If any portion of the new location should fall within the boundaries of the appropriation for the canal, the title in fee simple to the land, as to such portion, would be in the State, but as to all other portions the title to the land would remain in the owner as before, subject to the public easement. The owner would no more lose his title to lands covered by a highway thus altered and located, than he would to land covered by a highway laid out or altered in the usual manner."

The present act covering alteration of roads is Section 120 of the Canal Law¹⁰ which reads as follows:

§ 120. ALTERATION OF ROADS. If the superintendent of public works, or assistant superintendent having charge of the work, deems it necessary to discontinue or alter any part of a public road, because of its interference with the proper

10. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 969.

location or construction of any work on the canals, either of construction, repairs or improvement, he shall direct such discontinuance or alteration to be made, and file an accurate description of the part of such road so discontinued and laid out anew in the office of the town clerk of the town in which the same is situated; and from the time of filing such description, such road shall be so altered.

The passage of the part of such road so discontinued or altered shall not be obstructed until such superintendent or his assistant opens and works the part of such road so laid out anew, as to render the same passable. The written certificate of a justice of the peace of the county in which such road is situated that the part so laid out anew has been so opened and worked, shall be sufficient evidence thereof. Every alteration made by any engineer on any public road upon either of the canals before the first day of January, eighteen hundred and twenty-eight, shall be deemed valid in law from the time of such alteration.

It is to be noted that no provision is made or authority given for the appropriation of lands; no map is required — only “an accurate description” to be filed in the town clerk’s office.

An opinion by the Attorney General, dated October 10, 1906, is to the effect that the Barge Canal Law makes no provision for altering highways and that it therefore becomes necessary to turn to the Canal Law for authority to make such a change. Reference is made to Section 110 of the Canal Law, which is now Section 120 above quoted. The opinion states that before an existing highway is interfered with, the Superintendent of Public Works should provide and prepare for travel a new highway and file a description thereof in the town clerk’s office, but it does not state that lands required for a new highway should be appropriated.

Attorney General Thomas Carmody rendered an opinion, dated April 19, 1912, in answer to the following inquiries:

1. Under Section 120 of the Canal Law is it necessary that a map be prepared?
2. In whom is the title to the lands within the highway laid out anew?

The answer to these inquiries was that it was not necessary to do more than file a description; that the filing of a map was a question of administrative discretion. The opinion continues:

“The State in laying out the road acquires no property interest in it. The title to the fee remains in the owners of the land subject to the public easement of travel” * * *

“It is still a town highway and the responsibility for its care rests on the town” — unless the State makes it a part of the system of improved highways.

By reason of Barge Canal construction it has been necessary to alter and lay out anew highways along the entire length of the canals. Nearly 200 parcels of land have been appropriated for highway purposes. These appropriations have been made by the Superintendent of Public Works. A map and description was prepared by the State Engineer, and the Superintendent of Public Works certified that the lands so described were “permanently appropriated for the use of the canals.” The inscription on the map recites that the lands are to be appropriated “for the construction of highways made necessary by the improvement of the canals.” Under the authority of the Higgins case and following the opinion of Attorney General Carmody it would appear as if the fee title to lands embraced within new highways outside of the line of the canal or canal lands remained in the owners of lands appropriated, subject to the public easement of travel. This fee ownership, burdened with the public easement, would have only a nominal value. But the question is not one of value but title and becomes important in connection with the maintenance of the highways, and will be material should the highways again be changed, altered or abandoned.

Section 120 of the Canal Law is not a provision for the acquisition of lands for canal purposes but for highway purposes. It is not provided that the title to real property appropriated for highway purposes shall be vested in the People of this State as in the case of lands appropriated for the use of the canals. (Section 83, Canal Law.)

In *Bradley v. Crane* (201 N. Y. 14) it was held:

“ There is nothing inconsistent in the public use of lands as a road and the retention by the land owners of the fee, subject to the easement.” * * * “ The law will not by construction effect through the instrument a grant of a greater interest or estate than was essential to the public use for which the grant was sought.” ¹¹

The Court of Appeals, in *Birmingham v. R. C. & B. R. R. Co.* (137 N. Y. 13) discussed the rights growing out of the construction of a bridge over a canal and stated that where such a bridge was a connecting link in a highway it was to be regarded as part of the highway. The early acts were considered and the statement was made that the Legislature, at an early day, provided that bridges over canals should be built by the town in which they are situated, but that no such bridge should be constructed without written permission from the Canal Commissioners. In 1839 the Legislature directed the Canal Commissioners to construct and maintain road and street bridges over the canals in all places where such bridges had theretofore been constructed and, in 1854, the Legislature prohibited the building of any street or road bridge over any canal except where a street or road was laid out, worked or used previous to the construction of a canal which intersected the street. Continuing, the court held that the bridge in question was in substance and effect nothing more than the continuation of the city street which it connected.

By Chapter 324 of the Laws of 1918, it was provided that where a waterway which is a part of the canal system of the State intersects a State or county highway, the approach to the bridge structure carrying such highway across such waterway may be maintained as a part of a State or county highway if the State Commissioner of Highways shall so order.

Fifth. Summary.

To summarize, the State owns the fee of lands embraced within highways as follows:

1. Generally when the State owns lands adjoining a highway on both sides thereof, or where it acquires title to lands

11. See also *Eldridge v. Binghamton*, 120 N. Y. 309.

crossed by a highway, and the fee of such highway is not excepted from the conveyance.

2. In some cases when the State owns lands on one side of a highway only. The State in acquiring lands bordering on a highway, by purchase, obtains the same title to the highway as an individual grantee. In case of an appropriation by the State of lands on one side of a highway, especially where the owner of the lands taken and adjoining a highway owns to the center of the highway or all the lands within the highway, the appropriation may or may not include the highway. If the highway is not specifically included, it may pass with the adjoining lands as in case of a purchase.

3. When lands are acquired by and conveyed to the State in connection with the elimination of railroad grade crossings. Such lands are being acquired from year to year and the record and descriptions thereof may be found in the office of the State Highway Commission at Albany. Such lands are sometimes covered by a bridge or approaches thereto or extend beyond for a considerable distance.

4. When highways are located on canal lands.

5. In addition, the State may own easement rights in lands adjoining State highways.

Sixth. Property Within Highways.*

Whether the State, a municipality, a corporation or an individual owns lands within the bounds of a highway is of importance for several reasons:

1. Section 222 of the Highway Law provides that all trees standing or lying on land within the bounds of any highway, shall be the property of the owner of such lands except that they may be used to repair highways or bridges. Likewise, the owner of the fee may harvest for his own use the fruit upon all fruit bearing trees standing within a highway. These trees cannot be removed by anyone other than the owner of the soil unless required for highway or street use. For that reason the owner of lands within a highway on which

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, p. 3665.

there are standing trees may prevent the cutting or trimming of same by companies operating railroad lines or constructing lines of poles and wires within a highway. The right of the public within the bounds of the highway is simply to travel upon the improved part thereof.

2. The owner of the fee of lands within a highway may make a temporary use of such lands if reasonably necessary for the proper utilization and enjoyment of his abutting property, provided he does not encroach upon the rights of the public or endanger the safety of those travelling upon the highway. This principle was involved in *Sweet v. Perkins* (196 N. Y. 482).

3. Valuable mineral deposits, quarry stone or other material may exist within the bounds of a highway and the ownership of and right to remove same becomes of consequence. The court held in *Town of Clarendon v. Medina Quarry Co.*¹² that the owner of valuable deposits of sand stone within the bounds of a highway may excavate within the highway and remove the sand stone provided that while so doing the highway is kept open to the passage of the public. The public has a legal right to use the land for highway purposes although the highway need not be kept open to its full width while the quarrying is being carried on. Attention was called to the fact that the temporary interference with highways as well as streets in villages and cities is frequently permitted and rarely refused "in the interests of public improvement and private enterprise." The owner should be entitled to reap the benefit derived from the sale of the stone and the public should be permitted to buy and have the use of the stone.

4. If the State owns the fee of lands embraced within a highway, no individual has the right to cut or remove anything therefrom or to excavate therein.

5. The owner of the fee of a highway or street might maintain underground passages or vaults so long as the surface is maintained and properly supported for public travel.

12. 102 A. D. 217; 92 N. Y. Supp. 530.

6. An owner or a tenant has rights in a highway. The State is liable if it interferes with such rights by appropriating an easement in the highway.¹³

13. *Spencer v. State*, 194 A. D. 79.

CHAPTER XII.

Bridges.

- First. Canal Bridges.
- Second. Railroad Bridges Over Canals.
- Third. Highway Bridges Over Canals.
- Fourth. Generally.
- Fifth. Interstate.

First. Canal Bridges.*

Section 121 of the Canal Law is authority for the construction of farm, road and street bridges over the canals, by the Superintendent of Public Works. This section reads as follows:

§ 121. FARM AND ROAD BRIDGES. The superintendent of public works is authorized and required to construct and hereafter maintain, at the public expense, road and street bridges over the canals, in all places where such bridges were constructed prior to the twentieth day of April, eighteen hundred and thirty-nine, if, in his opinion, the public convenience requires that they should be continued, whether theretofore maintained at the expense of the state or of the towns, villages and cities where they are situate.

The superintendent is authorized to construct farm bridges over such canals when the same, in his opinion, are reasonably required, having reference to the accommodation of the owners of the land and a due regard to economy to the state and the convenience of navigation. But this provision does not abridge the power of the superintendent in relation to streets, roads and bridges as prescribed by law on the date above specified.

When a farm bridge is constructed in lieu of one theretofore maintained by the owner of the land and damages are claimed by such owner for the appropriation of lands or

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 969.

other injury done in the enlargement of the canals, the benefit derived by the owner by being relieved from the expense of maintaining the farm bridge over the canal shall be set off against any damage so claimed.

The title to bridges constructed over the canals during different periods has been a matter for consideration and decision. In this connection it is necessary to determine whether the bridge was built under a general or special act and as to what, if any, provision was made as to ownership or maintenance. Ownership did not necessarily vest in the one on whom the burden of maintenance was placed. To illustrate, a complex situation arose in reference to a bridge over a creek on the line of the Erie Canal at a place where a Mohawk River bridge approaches the canal. In an opinion, rendered by the Attorney General, July 2, 1909 (page 645), the view was expressed that, since the bridge was constructed before 1839, it was covered by Section 121 of the Canal Law, which authorizes and requires the Superintendent of Public Works to construct and maintain bridges over the canals. The conclusion was reached that the general scheme of the statute, relating to canal bridges, is that the State is to construct and maintain all bridges required to be erected as a result of the opening of canals, and the towns are to construct and maintain all bridges across canals which may be necessary as a part of a newly laid out road or street since the completion of the canal to be crossed by same.

Unless otherwise expressed, ownership would naturally follow the construction of a bridge, and where the State provides the funds for the construction of a bridge, it should be deemed the owner thereof.¹

The ownership of so much of a bridge and the approaches thereto as are upon canal lands would naturally follow the ownership of the lands on which the bridge is located. If the State is the owner of the canal lands in fee it would resultingly be the owner of a bridge and the approaches located on canal lands unless otherwise provided.

1. See Highway Law, Sections 250 to 269, inclusive.

B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, p. 3585.

At present Section 126 of the Canal Law restricts the construction of farm and road bridges and provides, among other things, that if a private road is laid out by legal authority so as to require the erection of a new bridge over a canal, such bridge shall be constructed and maintained at the expense of the town or city in which it is situated.

Section 127 of the Canal Law makes provision for the construction of bridges over canals by municipal corporations. Such bridges are to be built at the cost and expense of the municipality and may be built at a point where the State is not maintaining a bridge.

The same question of title to a bridge arises on the abandonment of a canal as arises on the abandonment of a highway, and the foregoing conclusions would apply as well to one as the other.

Second. Railroad Bridges Over Canals.

Bridges are also built over canal lands and across canals for the purpose of carrying steam railroad and electric railroad tracks.

In some cases railroad bridges have been located over streams which have been later canalized.

In other cases railroad bridges have spanned valleys or gorges through which a canal has later been located.

Again, it has been found necessary to erect bridges where no bridges previously existed for the purpose of carrying railroad tracks not located in any highway or street over a newly excavated channel for canal purposes.

The early canals preceded the railroads and when the first railroads were constructed it was necessary for the railroad companies to construct bridges over existing canals.

The more recently constructed canals have intersected many existing railroads and made necessary the construction of bridges to support tracks already laid and which would be undermined by the digging of the new canal channel.

There is involved the question as to whether the burden of building new bridges or rebuilding old bridges should be borne by the railroad company or the State, as well as the ownership of such a bridge after construction.

The Legislature, in anticipation of the necessity of rebuilding

bridges, provided in the original Barge Canal Act (Section 3, Chapter 147 of the Laws of 1903) that "new bridges shall be built over the canals to take the place of existing bridges wherever required, or rendered necessary by the new location of the canals." All fixed and lift bridges were required to be not less than 15½ feet above water. Chapter 83 of the Laws of 1910 provided for the construction of bascule or swing bridges.

Chapter 801 of the Laws of 1913 amended the original Barge Canal Act by adding a provision that the Superintendent of Public Works may appropriate toll bridges and franchises and the right to take toll, but this amendment, as already stated, was held to be not within the power of the Legislature to enact, being in direct conflict with the Constitution.²

Many bridges had been erected across the old canals by individuals, the expense of constructing which had been borne by the State. The construction of the Barge Canal often necessitated a new bridge over same. As the old canals were to be abandoned the future use of the old bridges required consideration. Chapter 180 of the Laws of 1909 provided that the portions of the abandoned canals over which such bridges extended should not be sold and that it should not be lawful to cross abandoned canals without compensation.

Special acts were passed for the construction of bridges at Phoenix, Fulton and Minetto over and across the Oswego River.³ Chapter 68 of the Laws of 1916 made provision for the construction of a bridge over the Mohawk River in the city of Schenectady known as the Freeman's Bridge to take the place of the toll bridge theretofore existing.

The plans for Barge Canal construction provided for the widening and deepening of Fish Creek, which was to be used for Barge Canal purposes. It had previously been used for canal purposes and the title to the bed of the stream was in the State. A railroad company owned the banks and lands on either side thereof.⁴ The State appropriated the banks of the creek on which rested the abutments of an old bridge used by the railroad company. A

2. Half Moon Bridge Co. v. Canal Board, 91 Misc. 600.

3. Chapters 792 and 793, Laws of 1911; Chapter 716, Laws of 1915.

4. People v. N. Y., O. & W. Ry. Co., 133 A. D. 476; 117 N. Y. Supp. 1048.

new and longer bridge was required at a higher elevation than the old bridge. The question presented was whether the State was liable for the cost of the new bridge under Chapter 147 of the Laws of 1903 providing for the construction of new bridges to take the place of existing bridges. Held, that the State must pay for the new bridge; that although the bed of Fish Creek was owned by the State, and although the creek had been used for canal purposes and the State had the right to resume the use of the creek for canal purposes without making compensation, this right did not refer to a use which required the widening of the creek and the taking of lands along the sides thereof; that the use reserved to the State under legislative acts referred to, did not contemplate the construction provided for by the Barge Canal Act.

Following this decision, the State, in *L. V. R. R. Co. v. Canal Board* (204 N. Y. 471), contended that the provision in the Barge Canal Act requiring the construction by the State of new bridges was unconstitutional on the ground that it was the duty of railroad companies to construct and pay for new bridges; that the Legislature could not appropriate public moneys to be used for constructing new bridges since railroad companies had no legal right to compel construction by the State. The court held that although the State may not be legally bound to construct new bridges, the Legislature could recognize claims founded on equity and justice and so provide for their construction; that the State was liable for the cost of constructing a new railroad bridge which would include the approaches thereto for a reasonable distance to enable the trains of the railroad company to reach the elevation of the new structure.

A more recent decision which followed the *L. V. R. R.* case is that of the *O. & S. R. R. Co. v. State* (226 N. Y. 351). It was held that on the refusal of the State to construct a bridge, the railroad company had the right to construct same and that the State was liable for the cost thereof. It does not appear that the State appropriated the old bridge but it does appear that the Superintendent of Public Works ordered the destruction of same. To quote from the opinion: "To destroy a bridge is to appropriate it." * * * "There is an appropriation none the less." *

5. See also *People ex rel. N. Y. C. R. R. Co. v. Walsh*, 211 N. Y. 90.

Third. Highway Bridges Over Canals.

As a result of Barge Canal construction a new highway bridge was required over the Hudson River in the county of Washington. The State officials failed or refused to build a new bridge. In *Town of Easton v. Canal Board* (216 N. Y. 486), the requirement that new bridges should be built over canals to take the place of existing bridges was held to apply to highway bridges. The State officials were required to perform their statutory duty and to build the new bridge.

Section 250 of the Highway Law requires, in general, the towns of this State to pay the expense for the construction of bridges over streams or other waters within their bounds. If the stream forms a boundary line between a city of the third class and a town, such city and town shall share the expense. The cost of constructing a bridge over a stream forming a boundary line between two counties shall be borne wholly or in part by the counties separated by the stream, if the bridge forms a connecting link between the county roads.

In 1917 Section 269 was added to the Highway Law. Provision is made for the acquisition of certain toll bridges at the expense of the State if such toll bridges form a connecting link between two State highways. Under this Act the State of New York has acquired title to the so-called Greenbush Bridge between the cities of Albany and Rensselaer, which bridge is now the property of the State.

Fourth. Generally.

In general, unless bridges are paid for by the State of New York they are not the property of the State. Although railroad bridges over canals are not used by the State as such or controlled by State officials, excepting that they shall be so built and maintained as not to interfere with canal navigation, if they are paid for by the State, a future interest in the State may result from such payment, especially if the railroad and the bridge should be abandoned for railroad purposes. To illustrate: Existing railroads constructed at grade were bisected by the Barge Canal and a portion of the roadbed and right of way of the railroad company

appropriated for canal purposes. The value of the lands taken was not great but the resultant damages by reason of the break in transportation might have been large. As an alternative, the damages were measured by the cost of constructing bridges over the canal for the purpose of carrying the tracks over same. Bridges were built by railroad companies, while the cost thereof was paid by the State. Should the canal be abandoned at any such point of crossing and the bridge no longer required, and should the bridge be removed and the canal filled in and the tracks again laid at grade, the State should be entitled to the bridge, less the cost of replacing the roadbed.

Although the ownership of bridges may not in all cases vest in the one paying for same, there is the further question of the right or duty of maintenance and repair. This does not necessarily follow ownership. Various statutes have been enacted relative to maintenance and operation, regardless of ownership. The duty to maintain, repair and operate is material should an injury result from a failure of such duty.

Section 93 of the Railroad Law provides as to whom shall maintain bridges at crossings.

The Highway Law also makes provision as to the maintenance of bridges. (See Article IX, Highway Law.)

State owned bridges are generally under the care and supervision of the Superintendent of Public Works. This is true as to bridges acquired pursuant to Section 269 of the Highway Law. (See Chapters 642 and 643 of the Laws of 1919.)

The Superintendent of Public Works is also charged with the maintenance of farm and road bridges over the canals. (See Sections 121, 127 and 128 of the Canal Law.)

Fifth. Interstate Bridges.

In 1916, an Interstate Bridge Commission was created to consist of the State Engineer, Superintendent of Public Works and State Highway Commissioner, to act with a similar commission from the State of Pennsylvania, to acquire the rights, franchises and property of the several bridge corporations, municipalities, companies or others owning or operating bridges between the State of New York and the State of Pennsylvania. Provision was

made for the acquisition of such bridges by agreement or condemnation. The act referred to is Chapter 506 of the Laws of 1916, which was made Article VI of the State Boards and Commissions Law, which is Chapter LIV of the Consolidated Laws.

Pennsylvania adopted a similar act (No. 405) in the year 1917. This was amended in 1919 by Act 416.

Under these acts about 12 bridges over the Delaware River between the two States are to be acquired.

CHAPTER XIII.

Forest Preserve, State Parks and State Reservations.

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First. Generally.

The Forest Preserve, as defined by statute (now Section 62 of the Conservation Law), includes lands now owned or hereafter to be acquired by the State within sixteen counties,—12 in the Adirondack Mountain region and four in the Catskill Mountain region. Lands within the limits of any village or city are excepted as well as other lands described.

This act also defines the Adirondack Park as being all lands located in the Forest Preserve counties of the Adirondacks within specified boundaries. The Catskill Park consists of land described in the act and located in the Forest Preserve counties of the Catskills.

As a result of unpaid taxes, many parcels of land have reverted to the State. These lands have been sold by the Comptroller for unpaid taxes and conveyed to the State. A large part of the State's ownership of forest lands has been acquired through tax sales.

The acquisition of lands for Forest Preserve purposes, by purchase or appropriation, started about 30 years ago. Funds were first made available in 1890 and nearly 800,000 acres were acquired between that date and 1909 at a cost of about \$4,000,000.

The first purchases were made by the Forest Commission subject to the approval of the Commissioners of the Land Office. This Commission was superseded in 1895 by the Fisheries, Game and Forest Commission.

The Forest Preserve Board was especially created in 1897 for the purpose of purchasing forest lands. Purchases by this board did not require the approval of the Commissioners of the Land Office.

In 1914, the State was the owner of approximately 1,800,000 acres of Forest Preserve lands, of which about 200,000 acres were under water. In that year, the Conservation Commission reported to the Legislature a list of lands in the Forest Preserve in detail, showing the number of parcels owned by the State and the sources of title, together with a description and the location of such lands.

The Forest Preserve includes the Adirondack Park, by far the largest, the Catskill Park, as well as the St. Lawrence Reservation, John Brown's Farm and the Cuba Reservation — all defined by Section 62 of the Conservation Law. There is also included within the Forest Preserve the Lake George Islands, State Reservation at Saratoga Springs and numerous State game farms, nurseries and fish hatcheries.

These lands are within the following counties:

Clinton,
Essex,
Franklin,
Fulton,
Hamilton,
Herkimer,
Lewis,
Oneida,
Saratoga,
St. Lawrence,
Warren,
Washington.

Also

Delaware,
Greene,
Sullivan,
Ulster.

The extent of the Forest Preserve can only be realized by comparing it with other areas. It is as large, and larger, than some of the States of the Union.

The Conservation Commission has from time to time issued maps showing the Forest Preserve counties as well as the bound-

aries of the Adirondack and Catskill Parks. At present the State owns approximately one-half of the land within the Adirondack Park, and one-fifth of the land within the Catskill Park.

But very little land was acquired by the State in these two parks from 1909 to 1916, excepting as same was conveyed by the Comptroller for unpaid taxes.

A. ADIRONDACK PARK.

All lands located in the Forest Preserve counties of the Adirondacks within the following described boundaries, to wit: Beginning at the southeast corner of the town of Hope in the county of Hamilton, and running thence westerly along the southerly lines of Hamilton County, and continuing and following the southerly line of the town of Wilmurt, in Herkimer County, to the point of intersection with the westerly line of Herkimer County, and thence northerly along the westerly lines of Herkimer County to its junction with the southwesterly line of Saint Lawrence County; thence westerly along said southwesterly line of Saint Lawrence County to the most westerly corner of township fourteen, great tract three, Macomb's purchase; thence easterly along the northerly line of said township fourteen to the northeast corner thereof; thence northerly along the west line of township thirteen, great tract three, Macomb's purchase, to the northwest corner of said township thirteen; thence east along the north line of said township thirteen and the south line of township ten, tract and purchase aforesaid, to the southwest corner of the southeast quarter of said township ten; thence north along the west line of the said southeast quarter of the aforesaid township ten and the west line of the northeast quarter thereof to the north line of said township; thence east along said north line to the west line of township seven, great tract two, Macomb's purchase; thence northerly along the west line of township seven aforesaid to the northwest corner of the township; thence easterly along the northerly lines of townships seven and eight, great tract two, Macomb's purchase, to the southwest corner of township twelve of said great tract two; thence northerly along the west line of township twelve to the northwest corner of lot one in the south half of said township; thence easterly along the north line of said south half of said township twelve to the west line

of the county of Franklin; thence north along the west line of the county of Franklin to the northwest corner of the south half of township thirteen of great tract one, Macomb's purchase; thence easterly along the northerly line of the south half of townships thirteen, fourteen and fifteen of said great tract one, Macomb's purchase, to the west line of the old military tract; thence south along said west line to the northwest corner of township ten of said old military tract; thence easterly along the north line of said township ten to the west line of Clinton County; thence southerly along the west line of Clinton County to the north line of Essex County; thence easterly along the north line of Essex County to the northeast corner of the town of Wilmington; thence along the east and easterly line of the town of Wilmington to the intersection with the north line of the town of Keene; thence east to the northeast corner of said town of Keene; thence southerly along the easterly line of the town of Keene to the southeast corner thereof; thence easterly along the northerly line of the town of North Hudson to the most northeasterly corner of the said town; thence southerly along the easterly lines of the towns of North Hudson and Schroon to the southeast corner of the said town of Schroon; thence westerly along the southerly line of the towns of Schroon and Minerva to the northeasterly corner of Leggett's survey of the southwest quarter of township fourteen of Totten and Crossfield's purchase; thence southeasterly along the line of Leggett's survey to the southerly line of said township fourteen; thence southwesterly along the line of Leggett's survey, being the southerly line of said township fourteen, to the most southerly corner of said township; thence southeasterly along the easterly line of township thirteen and the westerly line of township twelve, to the southeasterly corner of lot twenty-five of township eleven of said Totten and Crossfield's purchase; thence southwesterly along the southerly line of lots twenty-five, twenty-six, twenty-seven and twenty-eight to the southwesterly corner of said lot twenty-eight; thence southeasterly along the easterly lines of lots forty-four, fifty-three, sixty-eight, seventy-seven and five of said township eleven, and of lots nine, twenty-one, thirty, thirty-seven and forty of the gore between township eleven of Totten and Crossfield's purchase and the Dartmouth patent and of lot five of ranges six, seven, eight, nine and ten of the Dartmouth

patent, great tract, to the southeasterly corner of lot five of said range six of said patent in Warren County, thence westerly along the southerly line of said range six of said Dartmouth patent to the northeasterly line of Palmer's purchase; thence southeasterly along the easterly line of said Palmer's purchase to the most easterly corner of the middle division of said purchase; thence southwesterly along the southerly line of the said middle division of Palmer's purchase through Saratoga County to the easterly boundary of the town of Hope in Hamilton County; thence southerly along the east line of the town of Hope to the place of beginning, shall constitute and be known as the Adirondack Park. All lands within said park now owned, or which may hereafter be acquired by the State, shall be forever reserved and maintained for the use of all the people.

B. CATSKILL PARK.

All lands located in the counties of Greene, Delaware, Ulster and Sullivan within the following described boundaries to wit: Beginning in Ulster County at the southeasterly corner of great lot five of the Hardenburgh patent; thence running northwesterly along the southerly boundary of said great lot five through Sullivan County to the east branch of the Delaware River in Delaware County; thence along the southerly bank of said east branch of the Delaware River to the Ulster and Delaware Railroad at the village of Arkville; thence along the said Ulster and Delaware Railroad easterly to the line between the counties of Delaware and Ulster; thence northeasterly along that line to the southerly line of Greene County; thence northwesterly along the southerly line of Greene County to the line between the towns of Halcott and Lexington; thence northerly along the easterly line of the town of Halcott to the line between great lots twenty and twenty-one of the Hardenburgh patent; thence northerly along said line to the south bank of the Bataviakill; thence along the southerly bank of the Bataviakill easterly to the west line of the State land tract; thence northerly, easterly and southerly along the line of the said State land tract to the line between the towns of Cairo and Catskill; thence southwesterly along said town line to the easterly line of the town of Hunter; thence southerly along the said easterly line

of the town of Hunter to the line of the Hardenburgh patent; thence easterly, southerly and westerly along the general easterly line of the Hardenburgh patent to the line between the towns of Olive and Rochester of Ulster County; thence easterly on said line to the point where the Mettakahonts Creek crosses the same flowing easterly; thence southwesterly parallel with the northwesterly line of the town of Rochester to the line between the towns of Rochester and Wawarsing; thence westerly and southerly along the line of the Hardenburgh patent to the place of beginning, shall constitute and be known as the Catskill Park. All lands within such park, now owned, or which may hereafter be acquired by the State, shall be forever reserved and maintained for the free use of all the people.

Second. Present Acts.

The Conservation Law is Chapter LXV of the Consolidated Laws and Chapter 647 of the Laws of 1911. Article IV was repealed in 1912 and a new article inserted.

Chapter 451 of the Laws of 1916 became Article IV of the Conservation Law, and provided, among other things, for the appropriation of real property consisting of lands and waters, or of forest and timber rights within the Adirondack or Catskill Parks or adjacent thereto. The Conservation Commission is authorized to appropriate such real property with the approval of the Governor.

The Conservation Commission is also authorized to adjust claims growing out of the appropriation of lands and to agree with the owner of such lands as to the value of same. On failure to agree, the Court of Claims has jurisdiction to hear claims for real property appropriated.

Although Section 59 of the Conservation Law is entitled "Appropriation of Real Property," many of the subdivisions thereof cover cases of purchase rather than appropriations. Some of the subdivisions cover both appropriations and purchases. It becomes necessary to analyze each provision for the purpose of determining whether it applies to an appropriation or purchase.

At the same session of the Legislature that Chapter 451 of the Laws of 1916 was enacted, there was also enacted Chapter 569 of the Laws of 1916, which provided for the issuing of bonds to

the amount of not to exceed \$10,000,000 for the acquisition of lands for State park purposes. Of this amount, the proceeds of \$7,500,000 of such bonds was made applicable to the acquisition of lands for State park purposes within the Forest Preserve counties.

This was a referendum act and was submitted to the People and voted upon and approved by the People at the general election of 1916.

The act provided that such moneys should be expended and lands acquired under the direction of the Conservation Commission, by and with the advice and consent of the Commissioners of the Land Office, in such manner as the Legislature should provide, either by purchase or appropriation.

The following are Sections 4 and 5 of Chapter 569 of the Laws of 1916, and cover in general the method of acquiring title thereunder:

§ 4. The proceeds of seven million five hundred thousand dollars of such bonds, after appropriation or appropriations therefrom by the legislature, shall be applicable to the acquisition of lands for state park purposes within the forest preserve counties which lands, if now owned by the state under existing law, would be part of the forest preserve. Such moneys shall be expended and lands acquired under the direction of the conservation commission by and with the advice and consent of the commissioners of the land office. Such lands may be acquired in such manner as the legislature shall provide, which may be either by purchase, by condemnation or by entry and appropriation with submission to the court of claims or supreme court for the determination and award of damages for such entry and appropriation, or by one or more of such methods as the legislature may provide; but no proceeding shall be instituted by condemnation or by entry and appropriation unless provision be made by law for filing the written consent thereto of the commissioners of the land office with the county clerk of each county in which lands proposed to be taken are situated. Subject to the filing of such consent, any such proceeding shall be conducted by and in the name of the conservation commission; provided, however, that if

any other board, officer or commission shall succeed by law to the general powers of the conservation commission in relation to the care of the forest preserve, such latter board, officer or commission shall have and exercise all of the powers and duties conferred by any provision of this section upon the conservation commission. The moneys realized from such bonds, after appropriation by the legislature, shall be available for payment of the purchase price, where lands are acquired by contract, and for the payment of judgments and awards in case of proceedings by condemnation or by entry and appropriation. No moneys shall be paid out under this section for the acquisition of lands by contract except upon the warrant and audit of the comptroller, after submission to him of vouchers therefor approved by the conservation commission and by the commissioners of the land office, accompanied with the certificate of the attorney-general approving the title to and conveyance of the lands purchased.

§ 5. The term "lands" as used in this act includes the improvements thereon, if any. All lands acquired under this act shall be for the use of all the people.

It is to be noted that the two acts of 1916, viz., Chapter 451 and Chapter 569, are not in all respects harmonious. It has been necessary not only to harmonize these acts, but also to construe them in certain particulars.

CHAPTER 451, LAWS OF 1916.	CHAPTER 569, LAWS OF 1916.
(a) Conservation Commission	(a) Conservation Commission
may	may
Purchase (§ 50), or	Acquire as provided by
Appropriate (§ 59).	the Legislature by
	Purchase, or
	Condemnation, or
	Entry and Approp-
	riation.
(b) With the approval of the Governor.	(b) With the advice and consent of the Commissioners of the Land Office.

- | | |
|---|--|
| (c) The Conservation Commission may adjust claims without further approval. | (c) The Conservation Commission may adjust claims with the approval of the Commissioners of the Land Office. |
| (d) Lands must be within Adirondack or Catskill Parks, or adjacent thereto. | (d) Lands must be for State Park purposes within the Forest Preserve counties. |

(a) As no funds were provided for the purpose of acquiring lands under Chapter 451 of the Laws of 1916, this act is not primarily operative. However, Chapter 569 of the Laws of 1916, which did provide funds, left it to the Legislature to fix the method of acquisition, specifying that it may be by one or more of the three methods mentioned.

By Chapter 146 of the Laws of 1917, the Legislature provided two specific methods of acquisition, viz.: by purchase, or by entry and appropriation. If the method was to be by entry and appropriation, it should be pursued in the manner provided by Section 59 of the Conservation Law.

The following are Sections 2 and 3 of Chapter 146 of the Laws of 1917:

§ 2. Any such lands may be acquired under the direction of the conservation commission by purchase, by and with the advice and consent of the commissioners of the land office, without other approval, or they may be acquired under the direction of the conservation commission by entry and appropriation in the manner provided by section fifty-nine of the conservation law, as amended, relating to lands within the Adirondack or Catskill parks or adjacent thereto. All the provisions of such section shall apply to lands to be acquired under this act and the acquisition thereof and to compensation or damages therefor, excepting as follows: (1) the entry and appropriation shall be with the advice and consent of the commissioners of the land office instead of the approval of the governor, and (2) such consent, in writing,

shall be filed with the county clerk of each county in which lands proposed to be taken are situated.

§ 3. No moneys appropriated by this act, shall be paid out for any purpose, other than to pay judgments of the court of claims, except upon the warrant and audit of the comptroller and only after submission to him of vouchers therefor approved by the conservation commission and by the commissioners of the land office, accompanied, in the case of payments for lands acquired by contract, with the certificate of the attorney-general approving the title to and conveyance of lands purchased. Judgments of the court of claims under section fifty-nine of the conservation law shall be paid as therein provided.

Section 3 was amended by Chapter 10 of the Laws of 1918, and again by Chapter 605 of the Laws of 1920, specifying more in detail the purposes for which moneys might be used, including interest. The section now reads as follows:

§ 3. The moneys appropriated by this act shall be available for the payment of the contract price of such lands as may be acquired hereunder by purchase, or for interest upon such contract price, or for taxes levied upon such lands, or for the payment of judgments of the court of claims in the case of lands acquired hereunder by entry and appropriation, or for the expense of inspection of lands offered for such purchase or so purchased or otherwise acquired, or for the expense of the examination or approval of the title to or conveyance of such lands, or for any other expense necessarily incurred as an incident to the acquisition of lands pursuant to chapter five hundred and sixty-nine of the laws of nineteen hundred and sixteen and acts amendatory thereof or supplemental thereto; provided, however, that no moneys shall be paid out for any such purpose, other than to pay judgments of the court of claims, except upon the warrant and audit of the comptroller and only after submission to him of vouchers therefor approved by the conservation commission and by the commissioners of the land office, accompanied, in the case of payments of the purchase price of lands acquired by con-

tract, with the certificate of the attorney-general approving the title to and the form of the conveyance of the lands purchased. Judgments of the court of claims under section fifty-nine of the conservation law shall be paid as therein provided, except that no judgments of the court of claims shall be paid without the certificate of the attorney-general approving the title to the lands for the appropriation of which such judgment was rendered. In the case of lands acquired by purchase, legal interest and the taxes paid upon such lands from and after six months from the date of the approval of the purchase by the commissioners of the land office, shall be paid to the owner thereof, in cases where the owner submits to the attorney-general satisfactory evidence of title within six months after notice so to do. No interest or taxes shall be paid upon lands, the purchase price of which has been already paid.

From the foregoing, it develops that lands may be acquired for State park purposes,

By purchase, or

By entry and appropriation.

(b) Such acquisition may be made under the direction of the Conservation Commission with the advice and consent of the Commissioners of the Land Office.

(c) Under Section 59 of the Conservation Law (Paragraph 6), the Conservation Commission may agree with the owner of lands taken as to the amount of compensation, but lands are not being acquired by virtue of the Conservation Law. In this respect, Chapter 569 of the Laws of 1916 is controlling. This has been supplemented by Chapter 146 of the Laws of 1917. These acts provide that no moneys shall be paid out for any purpose, other than to pay judgments of the Court of Claims, except upon the warrant and audit of the Comptroller after submission to him of vouchers approved by the Commissioners of the Land Office.

An opinion by the Attorney General construing these several acts is to the effect that the Conservation Law (Section 59, Paragraph 6), is not controlling in case of an appropriation; that the Conservation Commission can only adjust the value of lands appro-

priated on the condition that such an adjustment is approved by the Commissioners of the Land Office.

(d) As Section 4 of Chapter 569 of the Laws of 1916 provided that the money available should be applicable to the acquisition of lands for State Park purposes within the Forest Preserve counties, the question arose as to whether it was the intention of the Legislature to limit the acquisition of lands within the boundaries of the Adirondack and Catskill Parks. It is to be noted that under Section 59 of the Conservation Law, which by Chapter 146 of the Laws of 1917, shall control the manner of entry and appropriation, the Conservation Commission may take lands "within the Adirondack or Catskill Parks or adjacent thereto."¹

The Attorney General held in an opinion rendered to the Commissioners of the Land Office, on May 8, 1918, that the Legislature had limited the use of the moneys appropriated by Chapter 146 of the Laws of 1917, to the acquisition of lands within these parks "or adjacent thereto;" that it thus became important to determine the significance of the word "adjacent;" that it referred to lands lying near, neighboring but not of necessity in contact with these parks. The opinion concludes as follows:

"It is, therefore, my opinion that the Commission has the authority to acquire lands outside of the blue line which marks the boundaries of these parks, provided the lands acquired are lying near, neighboring but not necessarily in contact with these parks and provided, in the judgment of the Commission, such lands are reasonably necessary for State park purposes.

"Whenever lands outside the boundaries of the parks but adjacent thereto are considered by the Commission and the Commissioners of the Land Office with reference to acquisition for park purposes, it will become necessary to consider all of the facts and circumstances in order to determine whether such lands are sufficiently near to be available in the judgment of such officers to meet the requirement of the referendum act that the same shall be acquired for the pur-

1. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 1207.

pose of carrying out the project of the Adirondack or Catskill Park."

The reference to "the blue line which marks the boundaries of these parks" is to blue lines shown on maps of the Adirondack and Catskill Parks, issued by the Conservation Commission. The blue lines as so shown follow the description of the exterior boundaries of the parks described in Subdivisions 2 and 3, Section 62, of the Conservation Law.

It thus appears that \$7,500,000 has been made available for the acquisition of lands within and adjacent to these parks. Anyone owning lands within the bounds thereof and desiring to sell such lands to the State may communicate with the Conservation Commission at Albany.

Third. Procedure. (Conservation Commission.)

In order to vest title in the State, and for the owners of land to secure pay therefor, various steps are required to be taken by the Conservation Commission, Commissioners of the Land Office,² Attorney General, Comptroller and State Treasurer. Searches must be made in the offices of the Secretary of State, county clerks, county treasurers, State Comptroller and Bankruptcy Courts. It was found necessary to establish rules and regulations and an orderly procedure. Such rules and regulations were adopted by the Commissioners of the Land Office on April 25, 1918, and may be found at the end hereof. (See "Appendix VI.") They should be carefully studied and followed in order to avoid confusion.

Considering the amount of money available, the price being paid per acre and the procedure to be taken following the initial agreement between property owners and the Conservation Commission, as well as the procedure to be taken in case of an appropriation, the work of acquiring forest lands, under Chapter 569 of the Laws of 1916, will continue for some years. The following may be taken as a guide and will help to expedite the work at hand:

2. The Commissioners of the Land Office are as follows: Lieutenant Governor, Speaker of Assembly, Secretary of State, Comptroller, Treasurer, Attorney General and State Engineer.

A. DESCRIPTION.

Whether in case of a purchase or an appropriation, a definite description of the lands is required. This description should be in such form that lands so described may be definitely located on the ground. In some instances this requires a survey of the premises as well as a map thereof.

In many cases lands are held subject to rights previously granted, such as:

1. The right to cut trees thereon.
2. Rights of way for the passage of teams in removing logs and lumber.
3. Rights to erect and operate saw mills.
4. Rights to build and maintain dams and storage reservoirs and rights of way in connection therewith.
5. Rights of way to construct and maintain railroads or pole lines and wires.
6. Rights to lay and maintain pipe lines.
7. Rights to divert waters.
8. Leases.
9. Miscellaneous rights not herein specified.

In all such cases the description should be followed by a reservation of the rights granted and outstanding and such rights should be specifically described. No general form can be prepared. Each case will require individual consideration. Attention should be given to all highways, whether public or private.

All descriptions are subject to the approval of the State Comptroller.

B. RESERVATIONS.

In addition to the reservation of rights previously granted, it often happens that the individual offering lands to the State desires to reserve certain rights in and to lands offered. Such reservations are limited by statute, it being the policy of the State to obtain a fee simple title to all lands acquired by the State.

An owner of lands cannot reserve the right to occupy the whole, or a portion, of the lands to be conveyed for life, or for a period of years. If any lands are to be so occupied they must be ex-

cepted from the description of the lands offered. In general, an owner cannot reserve rights of way or water rights which have not previously been conveyed.

Section 59 of the Conservation Law, by Paragraphs 9 to 19, inclusive, specifies certain reservations which are sanctioned by law and the result of such reservations. Some of these reservations apply in case of a purchase and others in case of an appropriation. The following are Paragraphs 9, 10 and 11 referred to, with a statement after each as to the application thereof:

9. Owner may reserve timber on land appropriated. 1. The owner of land taken under this article may, with the written consent of the conservation commission, and within the limitations hereinafter prescribed, reserve trees thereon not less than eight inches in diameter, breast high, at the time of the service of the notice provided the removal of such trees will not destroy the forest cover. Such reservation must be exercised within six months after the service upon the owner of a notice of the appropriation, by the owner serving upon such commission a written notice that he elects to reserve such trees. If such notice be not served by the owner within the time above specified he shall be deemed to have waived his right to such reservation, and such trees shall thereupon become and be the property of the state. The presentation of a claim to the court of claims before the service of a notice of reservation shall be deemed a waiver of the right to such reservation.

(Applies to an appropriation only.)

10. Reservation on lands purchased. Land acquired by purchase may be taken subject to the reservation of the trees thereon down to eight inches in diameter, breast high, at the time of such purchase, with the right to the owner to remove the same within the time specified in the next section, or upon agreement between the commission and the owner, subject to any lease, mortgage, or other incumbrance, not extending fifteen years beyond the date of acquisition. The amount or value of any such lien, incumbrance or timber reservation, upon land so purchased, shall be deducted from the purchase price thereof.

(Applies to a purchase only.)

11. Right to reserve timber restricted. The right to reserve timber, and the manner of exercising and consummating such right, are subject to the following restrictions, limitations and conditions:

(a) Timber within twenty rods of a lake, pond or river cannot be reserved. Under the supervision of the commission roads may be cut or built across or through such excepted space of twenty rods, for the purpose of removing trees from adjoining lands, and the person reserving such timber on the adjoining lands, his legal representatives or assigns, shall have the right, which right shall be deemed a part of such reservation, to construct such roads, through and across the reserved timber land, and through and across such excepted strip, as may be necessary to remove the timber so reserved; but in constructing such roads only such trees shall be cut as are within the limits of such roads. The commission may prescribe the manner of all such roads and may permit the use of any dead, down or other necessary timber for the construction only of roads, skidways, lumber camps, or for fuel, which right shall also be deemed a part of the soft wood timber reservation by the owner. No trees or timber shall be cut for the construction of roads, camps or other purposes, except such as are reserved by the owner, or for which permission to cut has been given as provided in this section.

(b) All timber reserved by the owner must be removed from the land within fifteen years after the service of notice of reservation or the making of the contract of purchase, subject to reasonable regulations to be prescribed by the commission; such land shall not be cut over more than once, and said commission may prescribe reasonable regulations for the purpose of enforcing this limitation. All timber reserved, and not removed from the land within such time, shall thereupon become and be the property of the state, and all title or claim thereto

by the original owner, his legal representatives or assigns, shall thereupon be deemed abandoned.

(Applies to appropriation and purchase.)

1. *Distinction Between Reservation and Exception.**

The distinction between a reservation and an exception should always be borne in mind and applied. In brief, a reservation is a right or interest in and to the thing granted, reserved to the grantor, while an exception is something not granted at all. To illustrate: a right to cut trees on lands granted, or a right of way over same, is a reservation, while if lands are carved out of a description of a larger tract and not conveyed, there is an exception.

A recent decision which cites the earlier cases, drawing a distinction between reservations and exceptions, is *Walker v. M. & O. L. R. R. Co.*³

Even though the distinction clearly exists, the two words, "reservation" and "exception," are frequently used interchangeably, not only by attorneys, but by the courts; and the same confusion is found in legislative acts and judicial decisions, so that a reservation must sometimes be construed as an exception, and *vice versa*.

It is very common to find the two words both used, and it then becomes necessary to determine which was intended. In the *Walker* case cited, a right of way was granted to a railroad company, and the grantor reserved and excepted out of the premises granted a lime kiln, and the land occupied by same, so long as the kiln might be used for burning lime at least once in any year. The railroad company destroyed the kiln and constructed its tracks over it. *Walker* brought an action for ejectment. The court held that he had expressly "excepted" the lime kiln out of the lands conveyed, and hence that no title to the same passed to the railroad company; that at most, title would pass on the breach of the condition to use the kiln at least once in each year. Even with this expressed holding, the statement is found that

* See Weed's Practical Real Estate Law, p. 451.

3. 179 A. D. 313; 166 N. Y. Supp. 354; af. 226 N. Y. 347.

there was a clear intention to "reserve" out from the grant this particular parcel of land.

The Court of Appeals in 226 N. Y., at page 347, affirmed the Walker case and held that the absolute fee to the lime kiln remained in the grantor; that the attempted conveyance of the lime kiln was void.

A reservation was held to be an exception in *Consolidated Ice Company v. Mayor*.⁴ The fact that a certain portion of the lands described were excepted for a certain purpose, but that they were devoted to a different purpose, was held not to make the exception void; the land was not included in the grant, and no title passed regardless of the use for which excepted or to which afterwards devoted.

2. *For Whose Benefit.**

A reservation or exception in a deed must be for the benefit of the grantor; if for the benefit of a stranger to the conveyance, it is ineffectual and does not convey to the stranger any estate or interest in the lands described as against a subsequent purchaser in good faith who has paid a valuable consideration and who has recorded his conveyance. A title cannot be *created* in a stranger in that way. However, an owner of land may grant certain rights in and to same to one person, and later grant the fee to another, reserving the rights already granted.⁵

In the Sweet case,⁶ the deed contained an exception and reservation of the rights of lessees who held under a lease not recorded. The purchaser was held to have taken with notice of the rights of the lessees, same having been previously created and not having their origin in the exception and reservation contained in the deed.

The rule that a reservation or exception in favor of a stranger, in a conveyance, is void and inoperative, has been held not to apply where the reservation or exception was made to one who, although a stranger to the conveyance, was in fact the real grantee.⁷

4. 53 A. D. 260; 65 N. Y. Supp. 912; af. 166 N. Y. 92.

* See Weed's Practical Real Estate Law, p. 452.

5. *Tuscarora Club v. Brown*, 215 N. Y. 543.

Sweet v. Henry, 175 N. Y. 268.

6. 175 N. Y. 268.

7. *Nield v. Jupiter*, 175 A. D. 732; 162 N. Y. Supp. 465; af. 226 N. Y. 39, memo.

C. RIGHTS OF WAY BY NECESSITY.*

Although there may not be a specific reservation of a right of way or a specific exception of the fee to a strip of land for right of way purposes, there may be in effect an implied reservation of a right of way, viz., a right of way by necessity. This right may not only be impliedly reserved but may be impliedly granted as an easement appurtenant to lands granted. But little consideration seems to have been given to the question of rights of way by necessity as applied to forest lands. This is, undoubtedly, due to the fact that the lands have not had a large value and that property lines have not always been clearly defined; comparatively few highways have been laid out; streams and lakes have been used for transporting logs. On account of the mountainous conditions the main lumber roads have been located through the mountain passes with little regard to ownership.

The early patents generally covered large tracts of land embracing thousands of acres. These were in turn subdivided into lots, some of which contained a thousand acres, which were again subdivided. Although rights of way by necessity resulted on a subdivision and conveyance to different grantees but little attention was paid to rights of ingress and egress.

If one owning a lot or tract of land bordering a highway, and all located on one side of the highway and surrounded on the other three sides by lands owned by another, conveyed a portion thereof lying next to and adjoining the highway, he would impliedly reserve a right of way over and across the lands conveyed for the purpose of travel from the highway to the lands not conveyed or, in other words, a right of way by necessity would result. Should the conveyance cover the interior portion instead of that adjoining the highway, the grantee of the interior portion would, as an appurtenant thereto, acquire a right of way by necessity over the portion adjoining the highway. This is elemental.⁸

Should one person thereafter acquire title to both parts the right of way by necessity would be extinguished. As the State acquires large tracts through several conveyances and solidifies

* See Weed's Practical Real Estate Law, p. 415.

8. *Smyles v. Hastings*, 22 N. Y. 217.

its holding, many rights of way by necessity which had previously existed are extinguished.

If at the time of acquisition by the State of a particular parcel of land the same is burdened by a right of way by necessity, for the benefit and use of other lands, the same should be given consideration and the conveyance to the State should be made subject thereto. If it is not made subject thereto, the right will, nevertheless, remain until the lands to which the right is appurtenant shall be acquired by the State.

Land burdened by a right of way, whether specifically reserved or existing by necessity, would, naturally, be of less value, and if the right did exist the depreciation in value would depend upon the extent of the right, which would include the right to cut down and remove trees and build roads.

If a sufficient right of way by necessity has been located, such location becomes fixed and no other lands may be used for right of way purposes. This would follow the principle that a general grant of an easement, silent as to location, becomes certain and fixed after location.⁹ It frequently happens that although the right exists, the particular location has not been fixed and the right has not been exercised by actual use. If so, the right must be exercised so as to do as little damage as possible to the servient estate (the lands burdened with the right) and at the same time serve the dominant estate (the lands to which the right attaches).

D. QUESTIONABLE RIGHTS.

As to whether a right has been created and, if so, whether the same has been lost by non-user or adverse possession, is a question of fact as well as law which cannot be definitely determined by the Conservation Commission, Commissioners of the Land Office, or Attorney General. In some instances it may be possible to show by affidavit, with little probability of contradiction, that rights have been lost by nonuser or by adverse possession. As the lands involved are mostly forest lands, some of which have been lumbered and others in a virgin state, difficulties arise which cannot be overcome by affidavits.

9. *Onthank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194.

It very frequently develops that the right to mine, generally, or to mine and take out particular minerals, has been granted or reserved; that years have rolled by, sometimes nearly a hundred years, and no mining operations have been carried on. In the acquisition of lands for State park purposes, these mining rights, unless extinguished beyond question, should be taken into consideration in fixing the value of lands offered and the purchase should be made subject to same, to be followed by acquisition from the owners thereof should it be so determined.

Rights of way have also been granted to railroad companies over and across lands offered for State park purposes. As some of the lands are not presently covered with a growth of trees, but have been cleared and used for agricultural purposes, a railroad right of way not exercised may have been extinguished.

In *Arnold v. N. Y. W. & B. R. Co.*,¹⁰ a strip of land, through agricultural land, was conveyed to a railroad company, which did not build upon same. The strip and the surrounding land was enclosed and used generally for pasturage purposes. It was held that after forty years the railroad company had lost title to the strip by adverse possession.

1. *Non-user*.*

A *non-user* has been held not sufficient to destroy a right reserved in lands, although the right may be lost by the adverse and exclusive use of same by another.¹¹

There must be shown an *intention* to abandon a right reserved in order to make the non-use of same sufficient to destroy the right. Although the right is not used for more than twenty years, it is not lost unless abandoned by some overt act or held by another claiming adversely for a period of twenty years. An owner of a right reserved may, through some act of his, estop himself from

10. 173 A. D. 764; 159 N. Y. Supp. 258.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 22, p. 1108; Bk. 27, p. 872.

11. *Andrus v. National Sugar Refining Company*, 72 A. D. 551; 76 N. Y. Supp. 530; 93 A. D. 377; 87 N. Y. Supp. 671; af. 183 N. Y. 580.

asserting the right, even though twenty years have not elapsed. These rules are all clearly set forth in *Welsh v. Taylor* (134 N. Y. 450).

2. *License*.*

In addition to conveyances by deed and rights arising by operation of law, other rights may be involved by virtue of a license granted pursuant to which structures may have been placed upon lands offered to the State. If the license is oral only, it creates no interest or estate in the lands and is revocable at the pleasure of the owner. Such a license was held to confer no rights which would survive its revocation, and a conveyance by the owner was held to revoke the license.¹²

To the same effect see *Munter v. Kobre* (107 Misc. 261), which held that a parol license to enter upon lands and maintain a structure thereon, even though intended to confer a continuing right and even though the licensee had entered and expended money, is revocable.¹³

In general, it becomes necessary to examine in each instance when lands are offered to the State, and to determine, if possible, all rights affecting the lands offered.

E. HIGHWAYS.†

The question of the right to maintain highways as a result of reservations contained in the early State patents was considered in Chapter V hereof. It was pointed out that as to such highways title passed, the State reserving an easement only.

The lands being acquired for State park purposes are sometimes crossed by

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 17, p. 625.

See Weed's Practical Real Estate Law, p. 681.

12. *Matter of Trustees of Village of White Plains*, 124 A. D. 1; 103 N. Y. Supp. 596.

13. *Taylor v. Millard*, 118 N. Y. 244.

See *City of N. Y. v. N. Y. & S. B. F. & S. T. Co.*, 231 N. Y. 18, which held to the contrary by a divided court.

† See Weed's Practical Real Estate Law, p. 1004.

1. State highways.
2. County highways.
3. Town highways.
4. Private roads.

The ownership of the fee within the bounds of such highways is a matter for consideration. Two questions are presented: first, the rights of the public and, second, the rights of individuals to use the highways as a means of reaching privately owned lands, regardless of the rights of the public. The public, in general, have no rights which need be respected so far as compensation is concerned, *i. e.*, the public in general can show no monetary loss should a highway be closed. Individuals having private rights are in a different position and may be entitled to compensation if a highway is closed. These dual rights and the distinction should always be kept in mind. These rights co-exist.¹⁴

In determining the ownership of lands within the bounds of highways, the manner of opening a highway and the procedure attending same should be examined, although records are seldom available as to the old highways.

Article VIII of the Highway Law, Sections 190 to 240, inclusive, sets forth the procedure for laying out, altering and discontinuing highways or private roads. Some of the existing highways have been laid out under the provisions of this or earlier acts, and the papers relating to such proceedings may be found on file in the offices of the respective town clerks. (Section 239, Highway Law.)

Where lands have been conveyed for a "public road" the Court of Appeals has held¹⁵ that a fee did not pass — only an easement for highway purposes. This case is authority for the rule that a municipality cannot take more land or a greater estate than required in order to serve the purpose for which the acquisition is being made.

In addition to existing highways the remnants of old highways may sometimes be found, and the inquiry presents itself as to whether they have been abandoned.

14. *City of Buffalo v. D., L. & W. R. R. Co.*, 190 N. Y. 84.

15. *Bradley v. Crane*, 201 N. Y. 14.

Section 234 of the Highway Law provides that "every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right of way."

In *City of New Rochelle v. N. R. C. & L. Co.* (224 N. Y. 696) it was held that a highway which has been closed to travel for its entire width for more than six years ceases to be such.

To the same effect see *Barnes v. M. R. R. T. Co.* (218 N. Y. 91). Obstructions which occupy only a portion of a highway, thereby narrowing, but not closing the line of travel, do not extinguish the highway. It is not necessary that the entire highway be abandoned; only a portion thereof may cease to exist as such.

The *Barnes* case draws a distinction between a highway, the fee to which is vested in the public, and one where the public has only a right of travel.

The rights of the public and the individual in highways and roads is material on the acquisition of lands for State park purposes not only with reference to title and values but also future maintenance.

Article VII, Section 7, of the State Constitution, provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, shall be forever kept as wild forest lands. Is this a prohibition against the future maintenance of highways in and through the Forest Preserve lands?

An opinion by the Attorney General, dated July 29, 1918,¹⁶ although not directly in answer to the inquiry under consideration, referred to this constitutional provision. The conclusion was reached that the fee of highways should not be conveyed to the State, but only the right of the public to use and cross same in common with the owner, and to improve and maintain same as a public highway, should be conveyed to the State in order to permit the maintenance of highways and the cutting of trees within the bounds thereof.

16. See "Appendix I."

A later opinion was rendered by Attorney General Charles D. Newton, dated March 11, 1920.¹⁷

This opinion is to the effect that the constitutional prohibition referred to does not prevent the maintenance of highways in and through the Forest Preserve, or the cutting of trees within the bounds of such highways.

Reference has been made to the dual rights of the public and individuals. The public referred to is the general travelling public regardless of residence. Anyone, whether a public official or not, may travel a public highway as one of the general public and may assume it to be safe for travel. Such highways are maintained generally as provided by the Highway Law.

The acquisition by the State of large territories in the Forest Preserve counties and the resultant duty of the Conservation Commission to care for and control these tracts of land, and in particular to maintain a system of forest fire protection, including fire observation stations, requires the maintenance of highways or roads for the use of the Conservation Commission and its agents. By reason of these facts a third interest or right in highways may result unless the public nature of a highway may be converted so as to preclude the public and change a public highway into a road passable only for the use of the Conservation Commission.

A public highway existing over lands offered may retain its character as such and be used by the Conservation Commission and its agents in common with the travelling public or it may be closed to the public and used only by the Conservation Commission.

The State may own or acquire title to a highway although the same is being used by the public, or the State may own or acquire title to a highway the use of which may be limited to the Conservation Commission. This latter ownership would be proprietary, and the use by the Conservation Commission that of an agent of the State Government.

17. See "Appendix VII."

F. MINES AND MINERALS.*

Early letters patent contained an exception and reservation of all gold and silver mines. Section 5 of the Public Lands Law requires that all letters patent issued at the present time shall contain the same exception and reservation.

Articles VII and VIII of the Public Lands Law cover the subjects of mines and mineral springs. Section 80 of the Public Lands Law enumerates the mines and minerals which are the property of the People of this State.

Although gold and silver is not generally found in the Adirondack or Catskill Mountains, other minerals exist and mines have been operated from time to time. It is not uncommon to find an exception and reservation of mines and mineral rights in deeds conveying lands in the forest parks, and these mining and mineral rights are, in some cases, outstanding and have been for a long period of time. Sometimes they are held in fractional quantities.

Section 84 of the Public Lands Law provides for working mines upon State lands within the Forest Preserve under permission to be given by the Conservation Commission, but nothing shall authorize the cutting or destruction of timber excepting as therein specified.

An outstanding right to mine, carrying with it the right to cut and destroy trees, may be highly detrimental and depreciate the value of lands offered. For that reason they cannot be safely ignored even though the right has not been exercised for a long period of time.

G. POLE LINES.†

Lines of towers, poles and wires for the transmission of electricity, or for telegraphing or telephoning, are sometimes located upon lands without or within highways. There are instances of grants not followed by construction, the right to construct, nevertheless, existing.

* See Weed's Practical Real Estate Law, p. 742.

B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6780.

† See Weed's Practical Real Estate Law, p. 1111.

But little question can arise as to the effect of these rights, unless the line is located in a highway. A case in point is that of the New York Telephone Company v. State.¹⁸ The rights of the telephone company were involved, covering a line of poles and wires extending for a considerable distance upon a public highway. Some of the owners of the underlying fee had granted to the telephone company the rights to maintain poles and wires; others had not. The court held that the telephone company had rights entitling it to the maintenance of its line only in so far as it had secured grants.

The materiality of these rights results from the policy of the State to acquire a fee title for State park purposes and to the constitutional provision referred to, that the Forest Preserve shall be kept as wild forest lands.

The agreements under which lands are offered specify, among other things, that the one offering will convey by warranty deed free and clear from all incumbrances. *Fossum v. Requa* (218 N. Y. 339), is authority that the existence of telegraph and telephone wires and poles constitute an incumbrance of which the buyer may complain, although a public highway is not.

In general one offering lands should deliver a fee title absolute without reservations. If he cannot do so all outstanding interests or rights require special consideration.

H. SUMMARY.

To summarize:

1. Lands offered or to be appropriated should be definitely described so as to be capable of identification and location beyond question.
2. If not owned in fee simple absolute, lands should be described and offered subject to any rights previously granted or rights previously created through lapse of time by operation of law or necessity.
3. No new rights or reservations can be created or carved out of lands offered excepting, generally, trees may be reserved with certain limitations.

18. 169 A. D. 310; 154 N. Y. Supp. 1059; af. 218 N. Y. 738.

4. As to whether there are outstanding rights may sometimes be incapable of determination.

5. Particular consideration should be given to existing highways or roads as well as those contemplated, not only to determine present rights but in order to insure future maintenance when required.

The procedure above outlined (Third, A to H, inclusive) is all for the consideration of the Conservation Commission, which, under the acts and rules and regulations referred to, enters into the agreement to purchase and recommends to the Commissioners of the Land Office a purchase or an appropriation.

In case of a purchase an agreement may be made with each person having a separate and distinct interest in the premises or one of such persons may make such an agreement on behalf of all and acquire all outstanding interests. The agreement may also cover only one interest, leaving other interests outstanding. This agreement is referred to in the rules as an "offer in writing."

In case of an appropriation, the physical property and all right, title and interest in and to same may be acquired by appropriating from all parties in interest; or the interest of one only may be appropriated, to illustrate: the title of the fee owner may be appropriated leaving outstanding any previously granted rights, such as mining rights, water power rights, rights of way, etc.

After the Conservation Commission has made a physical examination of lands, agreed with an owner as to the value thereof and recommended to the Commissioners of the Land Office the purchase at an agreed price, or on failure to make an agreement, has recommended an appropriation, and after the Commissioners of the Land Office have approved of the recommendation to purchase or appropriate, the Conservation Commission has performed its full duty under the acts, rules and regulations recited, excepting in case where title is not approved by the Attorney General, which is later considered.

Fourth. Procedure. (Commissioners of the Land Office.)

Both Chapters 569 of the Laws of 1916 and 146 of the Laws of 1917 provide that although lands are to be acquired for State

park purposes either by purchase or appropriation "under the direction of the Conservation Commission" they are to be so acquired "by and with the advice and consent of the Commissioners of the Land Office."

The use of the words "advice" and "consent" shows that the Legislature distinguished as to what the Commissioners may do. This may be construed as vesting in the Commissioners of the Land Office power to outline policies in conjunction with the Conservation Commission, such as determining what portion of the parks should be first acquired with a view to consolidating the State's holdings. Various questions of policy might arise as to which the Commissioners of the Land Office have been given a voice. To illustrate: it might be policy to first acquire lands at the head-waters of streams.

The Commissioners of the Land Office may or may not approve the purchase of lands recommended by the Conservation Commission at the *price* agreed upon.

It frequently happens that descriptions so far as known are not sufficiently definite and that a survey is necessary before a formal agreement can be made and acted upon, or before a recommendation to appropriate can be formally approved. The Conservation Commission may not feel justified in incurring the expense of a survey without knowing whether the Commissioners of the Land Office would approve the proposed purchase or appropriation if recommended by the Commission. In such cases the Conservation Commission may present the matter to the Commissioners of the Land Office for advice and if the general proposition to acquire lands in question is approved by the Commissioners, the Commissioners may advise a survey and the incurring of the expense of same.

The Commissioners of the Land Office may grant or withhold their formal consent to purchase or appropriate a particular tract or parcel of land. It is not required that they assign any reason for so doing. A failure to approve may be based on value, location or some other ground not stated.

Although the Commissioners of the Land Office may not approve a purchase as recommended, they may advise a purchase at a less amount or they may advise an appropriation.

In case of advise at a less amount, the matter again comes before the Conservation Commission to negotiate anew with the property owner.

In case of advise to appropriate, it is then for the Conservation Commission to determine whether it wishes to recommend an appropriation.

A consent by the Commissioners of the Land Office to an appropriation cannot be effective unless the description before it and on which the consent is based, is specific and accurate. The consent may be to appropriate:

1. The land described, or
2. Only an interest in the land, or
3. Subject to some interest in the land.

Formal consent to appropriate must be given by the Commissioners of the Land Office. This must be in writing and filed in the office of the county clerk of the county where the land described is located.¹⁹

Fifth. Procedure. (Attorney General.)

The Attorney General is one of the Commissioners of the Land Office, and as such has a vote and may give or withhold his advice or consent on any proposal or recommendation made by the Conservation Commission.

The Attorney General is also the law officer of the State. His opinions, though administrative, bind the several State departments and are entitled to weight. It was so held in *Grace v. Town of North Hempstead*.²⁰

When an agreement and recommendation are presented to the Commissioners of the Land Office by the Conservation Commission, the Attorney General, as the law officer of the State, is concerned as to the form thereof. The rules require his approval.

A specific duty is imposed upon the Attorney General by Chap-

19. Chapter 146, Laws of 1917, § 2.

20. 166 A. D. 844; 152 N. Y. Supp. 122; af. 220 N. Y. 628, citing *People v. Hylan*, 212 N. Y. 236.

ter 569 of the Laws of 1916. This act requires him to approve title, as well as a conveyance of lands purchased.

Chapter 146 of the Laws of 1917, as amended by Chapter 10 of the Laws of 1918, provides that the Attorney General shall approve title to, and the form of the conveyance of, lands purchased; also that no judgment of the Court of Claims shall be paid without the certificate of the Attorney General approving the title to the lands for the appropriation of which such judgment was rendered.

This duty is one requiring the Attorney General to certify that the title to lands offered is marketable and that the acceptance of the conveyance thereof by the State would place the State in a position where it could maintain an action in ejectment or trespass against anyone entering upon the lands or where the State could successfully defend any attack made against the State's claim of title.

The lands involved are generally what are known as "wild, vacant and forest lands." Sometimes there is or has been a possession in varying degrees.

In making a search and examination of title, unusual care is required by the courts. As was said in *Goldstein v. Rosenberg* (191 A. D. 492): "The plaintiff must, therefore, be deemed to have known the facts disclosed by the record * * * and every other fact which an inquiry suggested by the record would have led up to." If the record suggests an inquiry, the examiner should follow it up and ascertain whether it leads to a defect.²¹

A. RECORD TITLE UNDER PATENT.

Where the land has not been occupied, improved or enclosed and reliance is placed solely upon a paper title, the record must disclose a chain of title from the original patentee. It was so held in *Miller v. L. I. R. R. Co.* (71 N. Y. 380). The court stated that possession unaccompanied by paper title must be actual and that when lands are unoccupied, unimproved and unenclosed it is quite difficult to show possession; that occasional entries upon

21. See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 10, p. 121.

the land do not constitute the requisite possession. A deed from one not in possession, or from a stranger to the title, establishes no title.

To the same effect see *Greenleaf v. B. F. & C. I. R. Co.* (141 N. Y. 395). If title is not traced to the original patentee and if a chain of title from the original patent to the person claiming is not shown, no title exists and no right to land exists unless it is actually possessed.

The necessity of starting a search of title from the time of the grant to the original patentee in case land is uncultivated and there is no actual possession was also alluded to in *Judd v. Chilson*.²²

A chain of title is like a tree. The patent may be likened to the stump or source from which the trunk and branches grow. If an entire parcel is individually owned and conveyed from one to another, it will be all trunk; if subdivided into parts and separately owned and conveyed or if interests in common intervene, branches result. These may again merge in a common owner representing the topmost tip of the tree. If the same owner gives two conveyances of the same lands, twin trunks or branches will be produced. A search may be made by starting at the trunk if it is known and following each branch to its end and thus cover the entire tree, or a start may be made at the "tip of the tree" or end of a branch and by working back to the trunk. The latter method is necessary if the trunk is not known and it is all that is required in some cases where only one branch is involved. **There must be no broken branch in the chain.**

Unfortunately it has not always been the practice to start searches with the original letters patent and continue to date. Some searchers start about 1850 or later, while most of the early patents were granted about 1800. This is especially true where lands have been continuously occupied — adverse possession being relied upon in many instances in case of a defect in record. Many persons have purchased lands and even forest lands without a search. It is a surprise to some that a search covering a hundred and twenty-five years is necessary or can serve any useful purpose,

22. 177 A. D. 121; 163 N. Y. Supp. 695.

and individuals are inclined to rebel when called upon to cure defects in records long anterior to the time they purchased. But the fault is that of the individual in not calling upon his grantor to perfect the record — it cannot be passed on to the State. The Attorney General is charged with a duty which the individual purchaser is not.

1. *Early Records.*

Investigations have disclosed many unrecorded instruments stored away in family trunks and chests. Some are being preserved as heirlooms by those claiming no present interest in lands affected, to the great inconvenience and detriment of those presently claiming such lands.

These early patents covered large tracts granted when county lines were located differently than at present. Old counties have since been subdivided, consolidated and again subdivided or partitioned. To illustrate: records may be found in Albany county clerk's office and in other offices in Albany affecting title to lands in various counties other than Albany.

Early patents were often granted to persons living in New York City. Later the lands were partitioned or devised. Records, if recorded at all, may only be found in New York County. Transcribed records have not always been placed in newly created counties affecting lands in such counties. The Attorney General attempts to discover and locate these records as far as possible even at the expense of considerable time and money. Persons agreeing to convey lands to the State owe a duty to assist and to perfect the record title of forest lands to the end that title may be approved.

It frequently happens that all possible research will still leave missing links.

The underlying theory necessitating a continuous chain is that the State gave to one a patent — a piece of paper as the evidence of title. A stranger now offers a new piece of paper — a deed. He must show how he succeeded to the rights of the one to whom the State first granted a patent. His *claim* of title stands or falls on his ability or disability to connect link by link the patent and his claim.

If the State granted to Robert Brown, who did not convey or devise, and later Henry Brown conveyed the same lands, it might be shown that Henry was the only heir at law of Robert. This may be difficult or impossible after one hundred years. In such cases local histories, family bibles and other records may be resorted to. Recitals in ancient documents may cure defects and serve as connecting links.

B. RECITALS IN INSTRUMENTS.*

Pedigree is the history of family descent transmitted from one generation to another by both oral and written declarations. Unless proved by hearsay evidence, it cannot in many cases be proved at all. For this reason, declarations of deceased members of a family may prove family relationship — marriages, births and deaths. The admissibility of such declarations in evidence, as well as the admissibility of recitals in deeds as declarations upon the question of pedigree, were considered at length in *Young v. Shulenberg* (165 N. Y. 385). Title to "virgin forest" lands was involved. The lands had never been enclosed, cultivated or used so as to constitute an adverse possession. Letters patent were issued in 1794 and it became necessary to connect plaintiff's claim of title with that of the patentee. A deed executed in 1817 recited a death intestate, leaving the grantors as widow and heirs at law. Whether the grantors were the widow and heirs at law was a question of pedigree so remote in point of time that it was difficult, if not impossible, to prove. The recital was held to be proof of the fact recited. "Various presumptions are indulged in by courts founded upon the course of nature and general observation."²³

An opinion which reviewed the English cases, as well as decisions of other States, and in which the principles were discussed quite at length, may be found in *Aalholm v. People*.²⁴ Declarations

* See also *NORE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 5, p. 68; Bk. 10, p. 121.

See *Weed's Practical Real Estate Law*, p. 909.

Chamberlayne on the Modern Law of Evidence.

²³. See also *McKinnon v. Bliss*, 21 N. Y. 206.

²⁴. 211 N. Y. 406.

in regard to pedigree are admissible in evidence if the declarant is deceased, if there is not a motive to distort the truth and if the declarant was related to the family concerning which he speaks.

The principle involved in *Young v. Shulenberg and Aalholm v. The People*, above referred to, was the same as that involved in *Fulkerson v. Holmes* (117 U. S. 389), which has since been cited with approval and which is a leading case.

The practical application, effect and materiality of recitals and the benefits to be derived therefrom arise in supporting a claim of title even as against a naked trespasser. Although *Shulenberg* made no claim of title and was a mere squatter, having entered upon lands not claimed to be owned by him, cut down trees and carried same away, his right so to do could not be challenged by *Young*, who was not and had not been in actual possession, unless *Young* could show a chain of title from the original patentee. It is for this reason that the State, acquiring forest land by purchase, must thereafter be able to show a continuous chain of title or be able to show same by recitals. It has been repeatedly held that in actions of ejectment plaintiff must succeed on the strength of his own title, not on the weakness of the defendant's; that if neither establishes a legal title, the one showing prior possession will have the better right.²⁵

If the State were to take actual possession of lands purchased, it might rest on a record title more or less faulty, as against a mere trespasser. It was so held in the *Inman* case.

*Desoris Pond Co. v. Campbell*²⁶ held that "recitals in ancient conveyances, taken in connection with the possession and claim of ownership of the premises in harmony with them, must be deemed to create a conclusive presumption of the truth of the recitals."

It is to be noted that in the last case cited, the lands were actually possessed.

The principles under consideration, *i. e.*, the effect of recitals

25. *People v. Inman*, 197 N. Y. 200.

26. 25 A. D. 179; 50 N. Y. Supp. 919; *af.* 164 N. Y. 596.

in recorded instruments, is here discussed primarily as a strict record proposition regardless of possession.

Section 841-c, entitled "Recitals as to heirship in deeds," was added to the Code of Civil Procedure by Chapter 395, Laws of 1913. (Sec. 379, Civil Practice Act.) It provided that, thereafter in any proceeding, suit or action pending or thereafter brought, in any of the courts of this State, any deed, mortgage, lease, release, power of attorney, or other instrument more than thirty years old which contains recitals that the grantors, grantees or either, or both, are the heirs at law of a prior owner of the title or interest described in said instrument, shall be presumptive evidence of said heirship as therein recited, if such instrument be duly acknowledged or witnessed and proved in any manner required or permitted at the date of the execution thereof, and be duly recorded in any county where any part of the lands described therein shall be located, or duly recorded in the office of the Secretary of State of the State of New York.

The enactment of this section makes it no longer necessary to show that the declarant was a member of the family or that he could not be produced or could not testify on account of death.

Recitals in recorded instruments, and in particular deeds, may have a two-fold effect — they may serve as a connecting link in favor of a claimant or they may serve as a notice to a purchaser of an outstanding claim. Assume that one conveys by a deed containing a recital that the conveyance is made subject to an outstanding contract of sale. A purchaser is then charged with notice and knowledge as to which he cannot close his eyes.

In *Acer v. Westcott* (46 N. Y. 384, at page 392), it was stated: "If any defect had been alluded to in the recital, or if such defect would have appeared in any deed or will in his chain of title, then the purchaser is charged with constructive notice thereof, especially if such deed or will be recorded." This case also attempts to define the line which may be drawn between two classes of instruments — one class embracing instruments necessary to or connected with the title, and another class embracing instruments

not so necessary or connected with the title, but which may possibly affect it.

As to when an instrument or a recital in an instrument constitutes constructive notice was likewise considered in *Page v. Waring* (76 N. Y. 463).

A claim of title was made by one who attempted to connect with the patent although there was no recorded conveyance from the patentee forming a link in the chain of title claimed by him. There was a recital of a conveyance from the patentee, in a mortgage given to the patentee. This recital was held to be conclusive against the patentee or his heirs and one which claimant could take advantage of. But it was held to be of no avail as against and no notice to another claiming under a subsequent deed from the patentee.²⁷

Todd v. Eighmie cites *Losey v. Simpson* (11 N. J. Eq. 246), which states the following rules very clearly:

“The whole object of the registry acts is to protect subsequent purchasers and encumbrancers against previous conveyances which are not recorded, and to deprive the holder of the previous unregistered conveyance, etc., of the right which his priority in execution would have given him at the common law. * * * When one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the chain is continued. The title upon the record is the purchaser’s protection, and when he has traced the title down to an individual, out of whom the record does not carry it, the registry acts make that title the purchaser’s protection. The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed. * * * Nor will a purchaser be bound to take notice of the record of a deed executed by a prior grantee whose own deed has not been recorded. * * * And where the deed of a vendor is not recorded, the record of a mortgage given by the vendee for the pur-

²⁷ *Todd v. Eighmie*, 4 A. D. 9; 38 N. Y. Supp. 304; 10 A. D. 142; 41 N. Y. Supp. 1013; cited in 144 A. D. 333, 5; 128 N. Y. Supp. 1055.

chase money will not be notice to a subsequent purchaser.
 * * * For in any such case the purchaser is without a
 clue to guide him in searching the record. * * *

These rules are stated on the assumption that all searchers should commence with the original letters patent and continue from the patentee through the successive conveyances; that by so doing a mortgage (with or without a recital) from one not having the record title could not be found and would not be found in making a search in the manner required by law. However, after a century and a quarter, during which time lands originally patented have been subdivided again and again, in making a search against a small parcel thereof, and some times against a larger parcel, the practice has been to follow the chain of title from the present claimant *backward*. Had such a course been adopted in searching in the Todd case, the mortgage containing the recital *would* have been found.

Whether it would have been or should have been found, or not, if it is found by the present claimant, will it inure to his benefit as against the world?

Under the authority of the Todd case it will not prevail against one who holds under a chain of title which connects with the patent, even though the deed from the patentee is subsequent to that recited in the mortgage. This is on the theory that the first deed (not recorded but recited) and the mortgage containing the recital are not *notice* to the grantee, although he may be a second grantee.

But assume that one without any claim of title should enter on lands and an action in ejectment be brought against him by one who claims under the chain of title containing the mortgage and recital with no record title in the mortgagor. Plaintiff should succeed by virtue of the recital as against the defendant.²⁸

As an illustration of recitals in deeds and the effect thereof, see *Dingley v. Bon* (130 N. Y. 607). A deed of lands recited that certain portions of the property described therein had previ-

28. *Heiberger v. Karfiol*, 202 N. Y. 419.

ously been sold and conveyed. For the reason that no record of previous conveyances was found in the register's office, it was contended that the recital may be ignored and that the purchaser under a later deed took an absolute title in fee. The opinion states that the question presented is not free from difficulty, but that the contention could not be sustained for the reason that the recited deeds, although not of record, may be in existence and may, at some later time, be produced and recorded. A purchaser *having notice* of an outstanding unrecorded deed is in no better position than if the deed was recorded. In this case the recitals in one deed gave notice of the existence of other unrecorded deeds. The action was one to compel specific performance of a contract to purchase land and the defence was that the title was not marketable. The opinion states that the purchaser under the contract was entitled to a marketable title free from reasonable doubt and that the records in the register's office do not show such title. A distinction is drawn between the question involved, *i. e.*, specific performance of a contract to purchase, and an action in ejectment. One holding under a deed containing a recital that a portion of the land described had been previously conveyed, can *hold* possession of all the land described as against the world, excepting that he cannot hold against one having the prior unrecorded conveyance recited.

A recital in a deed after the name of the grantee in the following words "as trustee for the subscribers to the fund to establish a canning factory" was held to give no notice of any other or outstanding interest; the grantee was held to have taken a legal title which he could convey to a purchaser. The purchaser was not bound to give any consideration to the quoted recital.²⁹

It has been held that where one takes a mortgage from a mortgagor whose deed is not recorded, he is not charged with constructive notice of the recitals in such deed, which disclose the existence of a prior mortgage.³⁰ This is rather an extreme case holding that *adverse recitals* may not affect a title injuriously unless one takes with actual knowledge of same.

29. Fowler v. Coates, 201 N. Y. 257.

30. Ebling Brewing Co. v. Gennaro, 189 A. D. 782.

C. UNRECORDED CONVEYANCES — WHEN VOID.*

Section 291 of the Real Property Law provides when a "conveyance" of real property may be recorded in a county clerk's office and that "every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property, or any portion thereof, whose conveyance is first duly recorded." †

It may happen that two or more parties claim from a common source. It is not necessarily the first deed executed which will prevail, but the first deed recorded. Page v. Waring³¹ was a case where an owner executed a deed in 1827 but it was not recorded until 1864, although the grantee conveyed in 1830 by a deed which was promptly recorded. In 1861, thirty-four years after the original deed was executed, the grantor therein executed another deed to a different grantee which was promptly recorded. It was held that the grantee under the 1827 deed had no title as against the grantee in the 1861 deed.

Had the grantee in the 1861 deed taken with knowledge of the 1827 deed, the result would have been the opposite.

An heir at law or one claiming under him has been held to be not a "purchaser" under the recording act. In Strough v. Wilder³² (1890), an owner of lands gave a deed to one of her sons. The deed was not recorded. She later died intestate. Plaintiff purchased from some of her heirs and then brought a partition action. The son who held the unrecorded deed was a party defendant. He alleged title in himself and denied title in plaintiff. The court held that plaintiff was not a purchaser and that plaintiff took no title as against the unrecorded deed given by the intestate; that the conveyance from the heirs to the plaintiff conveyed nothing.

* See Weed's Practical Real Estate Law, p. 914.

† See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 7, p. 7500.

31. 76 N. Y. 463.

32. 119 N. Y. 530.

Two expressions are significant — one, that “the plaintiff is not a purchaser within the meaning of the statute,” and the other, that the defendants’ deed was good as against those claiming title from the heirs.

Although this decision is apparently based solely on the ground that a purchaser from an heir obtains no title as against an unrecorded deed from the ancestor, the facts recited show that the holder of the unrecorded deed was in possession. Without such possession, a different conclusion might have been reached.

This decision was cited in *McNally v. Fitzsimons*³³ (1902), in support of a contrary conclusion where the grantee was not in possession. It was held that a partition of real estate among the heirs vested title in the several heirs as against an outstanding unrecorded deed of which they had no knowledge; that by the partition each heir became a “purchaser” from the other.

The *Strough* decision contains the statement that when the heir has “come into the inheritance,” he may originate a title by purchase upon his conveyance to another. As his conveyance was not held to originate a title by purchase, it may be assumed that he had not “come into the inheritance.” The same expression is found in the *McNally* case, where it was held that the heirs had “come into the inheritance.” This may mean that they had come into possession.

If an heir comes into the inheritance immediately on the death of the ancestor, the conclusion reached in the *Strough* case must have been based on the fact that the holder of the unrecorded deed was in possession and that possession was noticed to the purchaser from the heirs.

1. *Wills.*

Wills are not always recorded in the county clerks’ offices. They should be in order to constitute constructive notice. It was so held in *Taylor v. Millard* (118 N. Y. 244). This decision was followed in *Jefferson v. Bangs*.³⁴ To quote from the opinion:

33. 70 A. D. 179; 75 N. Y. Supp. 331.

34. 169 A. D. 102; 154 N. Y. Supp. 439; af. 226 N. Y. 56 (memo.).

“Purchasers in good faith have never been required to search in the surrogate’s office for wills affecting real estate; and, therefore, wills and other documents lodged or recorded in the surrogate’s office have never been constructive notice to purchasers.

“A will is not a conveyance within the definition of the Recording Acts, but as early as 1846 wills of real estate were authorized to be recorded in county clerk’s offices and this was to give notice to would-be purchasers of the interest devised by the will. The plaintiff might have given notice to the defendants and to the world and have protected herself against the claims of innocent purchasers by recording the will in the county clerk’s office. (Laws of 1846, Chapter 182, as amended by Laws of 1869, Chapter 748.) But she failed to observe the law and now the rights of an innocent purchaser are intervening.”

Wills affecting the title to lands in the State of New York are sometimes probated in other States and not in New York State. They are entitled to be recorded in a surrogate’s office in this State under Sections 44 and 45 of the Decedent Estate Law * and in a county clerk’s or register’s office in this State under Section 42 of the same law. The steps to be taken as outlined in these sections should be carefully followed and may be summarized as follows:

I. Copy of will (or record thereof), *and also*
 Proofs (or records thereof), or
 Statement as to substance of proofs in absence of proofs (or record thereof) must be authenticated as follows:

A. By the seal of either the

1. Court or
2. Officer

- (a) Admitting the will to probate, or
- (b) Having the custody of the same, or
- (c) The record thereof, and

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 2, pp. 1772-6.
 Schouler on Wills and Administration, p. 346.

B. The signature of

1. Judge (if a court) and clerk (if any) or
2. Officer (if not a court) and clerk (if any).

II. There must be a further certificate:

A. Under the great or principal Seal of the State or territory, and

B. The signature of the officer who has the custody of such seal to the following effect:

1. That such court or officer admitting the will to probate (1 and 2 above) was duly authorized at the time
 - (a) To admit wills to probate, and
 - (b) To keep the same and records thereof.
2. That the seal of such court or officer is genuine.
3. That such State officer believes the signatures attesting copy are genuine.

If neither proofs nor statement as to substance of proofs are on file or recorded in the office where the will is probated, a *certificate* concerning such lack of proofs or statement must be secured. To entitle such certificate to be recorded in this State, it must be authenticated in the same manner as under No. I-A above.

In addition thereto, the signature of the

1. Judge, or
2. Clerk, or
3. Officer,

is also required, which must be authenticated as under

- II-A,
II-B-2, and
II-B-3, above.

The only distinction between the authentication covering the instruments recited under No. I and a certificate concerning lack of proofs or statement is that under the latter the signature of only the judge or clerk or officer is necessary and the certifi-

cate under the Great Seal need not certify that the court or officer was authorized to admit wills to probate and keep the same and the records thereof.

A form of certificate suitable for execution by the judge and clerk of the Probate Court and also the Secretary of State, the officer having the custody of the Great Seal of the State, may be found in "Appendix VIII." This form may be varied according to the conditions enumerated.

After record in a surrogate's office in this State, a record may be made in the county clerk's or register's office pursuant to the provisions of Section 42 of the Decedent Estate Law.

A will may be probated in another country as well as in another State and the validity of such probate may come in question. In case of a valid probate, the necessity likewise exists to perfect the record in this State if the will affects real property in this State. A case in point is *Matter of Connell* (221 N. Y. 190). Decedent died in the Province of Quebec leaving a will. Although she left no real property, the opinion of Judge Andrews relative to the proceedings taken is instructive. It was assumed that the will had been probated in Quebec, although in fact the will had not been probated there. The surrogate of New York County had no jurisdiction to record the will unless there was proof before him that the will had been admitted to probate in Quebec.

Sections 44 and 45 of the Decedent Estate Law provide for the recording of a will proved in another country as well as another State and for the authentication of papers from another country as well as another State for use in this State.

It has been repeatedly held that the probate of a will is not essential before the title to real property devised thereby will vest in the devisee.⁸⁵

2. *Deed from Heir.*

The revised statutes in effect in 1890 did not contain the words "from the same vendor, his heirs or devisees," as contained in Section 291 of the Real Property Law. These words were first

added by Chapter 547 of the Laws of 1896, being Section 241 of the Real Property Law. In the same year, Chapter 572 was enacted. These two acts of 1896 were under consideration by the Court of Appeals in 1912, in *Assets Realization Company v. Clark* (205 N. Y. 105). In the opinion of Judge Hiscock at page 119 appears the statement that by virtue of Chapter 572, the revised statutes, which had been repealed by the Real Property Law, were re-enacted without the words in question, *i. e.*, "from the same vendor, his heirs or devisees."

The Consolidated Laws of 1909 by Chapter 52 removed any doubt by the enactment of the present Section 291 of the Real Property Law, which is a consolidation of Section 241 of the Real Property Law of 1896, and part of Chapter 572 of the same year.

It therefore appears that since 1909 a purchaser from an heir who duly recorded his deed, if he was a purchaser in good faith and for a valuable consideration, took title as against one holding an unrecorded deed from the ancestor.

Sections 2765 *et seq.* of the Code of Civil Procedure provide that an heir may prove his heirship and secure a decree from the Surrogate's Court establishing same, and a certified copy of the decree establishing heirship may be recorded in the office of the clerk or register of the county in which the real property is situated, which shall be conclusive evidence of the facts established as against all parties to the proceeding. But such a decree could not affect the rights of one claiming under an unrecorded deed who was not a party to the proceeding. (Sec. 311, Surr. Ct. Act.)

D. TITLE ACQUIRED AFTER CONVEYANCE.

It is a well settled principle of law that in case one conveys lands not owned by him, by warranty deed, if he later acquires title, it will inure to the benefit of his grantee; the grantee will hold by estoppel. Assume that thereafter the grantor again sells and conveys the same lands to one having no actual notice of the prior recorded conveyance, is he protected as against the prior purchaser? In *White v. Patten* (24 Pick. [Mass.] 324) it was held that if one having no title to lands conveys same by warranty and afterwards acquires title and then conveys to a stranger, the second grantee cannot be heard to aver that his grantor was not

seized when he made his first conveyance. This decision raises the question as to whether it is necessary to search for a conveyance from one prior to the time he acquires title in order to determine whether he had conveyed or mortgaged prior to his acquiring the title.

White v. Patten was cited apparently with approval in *Tefft v. Munson* (57 N. Y. 97), and also in *Oliphant v. Burns* (146 N. Y. 218), and *Donovan v. Twist* (105 A. D. 171; 93 N. Y. Supp. 990). It is therefore entitled to serious consideration.

In the *Tefft* case the court was divided 3 to 2. A mortgage was given by one having no title for the reason that he held under a forged deed. But he later secured title and then conveyed. It was held that the subsequent purchaser was estopped from questioning the validity of the prior mortgage and that the record of a mortgage prior to the acquisition of title by the mortgagor was constructive notice to the subsequent purchaser in good faith; that under the recording act the mortgage had priority.

See *Abraham v. Mayer*,³⁶ which holds to the contrary.

Oliphant v. Burns distinguishes as between a deed or mortgage containing a warranty and a deed or mortgage containing no warranty. The estoppel only applies in case of warranty.³⁷

The general purpose underlying the recording acts was to prevent the fraudulent sale of the same property to different grantees by the same grantor.³⁸

E. RECORDING ACTS.

1. *Effect*.*

The early history of the recording acts under which deeds, mortgages and other conveyances were required to be recorded in the office of a register of deeds or a clerk of a county, is covered in *N. Y. C. R. R. Co. v. B. B. Co.* (158 N. Y. 470).

By Chapter 15 of the Laws of 1683 provision was made for recording such instruments in the offices named therein and also

36. 7 Misc. 250; 27 N. Y. Supp. 264.

37. See 16 Cyc. 698.

38. See *Marden v. Dorothy*, 160 N. Y. 39, 60.

* See *Weed's Practical Real Estate Law*, p. 914; p. 1484.

that such instruments be transmitted once each year to the Secretary's office at New York.

The Constitution of the State of New York continued in force as the law of the State, the law of the colony enacted prior to April 19, 1775.

Chapter 78 of the Laws of 1798 provided that all deeds and conveyances made and executed after February 1, 1799, of land in the counties of

Ontario, Steuben, Tioga, Herkimer, Oneida, Chenango and Otsego

shall be recorded in the clerk's offices in the counties in which such lands shall be situated, and that every such deed and conveyance made and executed after February 1, 1799, shall be adjudged fraudulent and void against any subsequent *bona fide* purchaser or mortgagee for valuable consideration, unless the same be recorded before the recording of the deed or conveyance under which a subsequent purchaser or mortgagee shall claim. The act further provided that the record of every such deed and conveyance, when so recorded, shall be taken and allowed as evidence of such deed or conveyance in all courts.

The Revised Acts of 1801 (Chapter 155) provided that such instruments be recorded in the office of the clerk of the county where the lands or real estate are situated. It has been held that the act was not necessarily mandatory but may be permissive.³⁹

Chapter 238 of the Laws of 1811 was to the same effect, as well as Chapter 97 of the Revised Laws of 1813.

Chapter 97 of the Revised Laws of 1813 may be found in Vol. 1, at page 369, of the Revised Laws, by VanNess and Woodworth. It is entitled "An Act concerning deeds" and provides that every deed, conveyance or writing concerning lands, in order to be recorded, shall be duly acknowledged and shall and may be recorded in the office of the Secretary of State or the clerk of the county in which the land is situated.

The act applied in particular to deeds affecting lands in the

39. Hall v. Conklin, 138 A. D. 450, 2; 122 N. Y. Supp. 967.

following counties, made and executed after the first day of February, 1799:

Herkimer, Oneida, Jefferson, Lewis, St. Lawrence, Otsego, Madison, Chenango, Broome, Tioga, Steuben, Allegany, Cattaraugus, Chautauqua, Ontario, Genesee and Niagara.

It was further provided that every deed executed after February 1, 1799, shall be adjudged void against a subsequent *bona fide* purchaser or mortgagee for value unless recorded as directed, before the recording of a subsequent conveyance. As to certain of the counties enumerated it was a re-enactment of Chapter 78 of the Laws of 1798. In *Peck v. Mallams* (10 N. Y. 509, 16) it was held that "a mortgage is a deed within the meaning of these provisions."

While these laws were being enacted, counties were being subdivided and new counties were being created, resulting in new offices of record.

Chapter 207 of the Laws of 1819 provided for the recording of deeds in the clerk's office of the county of Rensselaer.

Chapter 136 of the Laws of 1821 provided for the recording of deeds in the clerk's offices of the counties of Greene, Clinton, Franklin, Delaware and certain towns in the counties of Herkimer, Onondaga and Cayuga.

Chapter 245 of the Laws of 1822 provided generally for the recording of mortgages in the offices of the clerks of the respective counties of the State.

Chapter 263 of the Laws of 1823 provided for the recording of deeds and other conveyances in the office of the clerk of the county of Ulster. By the fifth paragraph, the provisions of the act were extended to the several counties of the State in which titles to real estate were not then directed to be recorded.

It therefore becomes necessary to take into consideration the time of the creation of the several counties in the State, and also the law applicable at the time as to each of the said counties.

Finally, by Section 1, Chapter 3, Part 2, of the Revised Statutes of 1829, general provision was made for the recording of conveyances in the respective counties where lands affected were located. Section 291 of the present Real Property Law is a substantial re-enactment.

Chapter 238 of the Laws of 1811 (above referred to) provided that every conveyance or writing relating to the title of lands, being duly acknowledged, may be recorded in the office of the Secretary of State *or* of the clerk of the county in which such lands are situated. An option was thereby given to record in one office *or* the other.

Chapter 295 of the Laws of 1839 made provision for the recording in the office of the clerk of any county or in the office of the register of deeds in the City of New York, a certified copy of any deed or conveyance affecting title to real estate which may be recorded or filed in the office of the Secretary of State.

The foregoing is a general review of the recording acts without an attempt to recite all of the acts providing for the recording of conveyances affecting title to real estate.

(a). Counties — Time of Erection.

Twelve counties of the State were erected before the origin of the State Government — ten on November 1, 1683, and two on March 12, 1772. For a complete list of all counties of the State of New York in order of their erection, see "Appendix IX."

A book entitled "Historical and Statistical Gazetteer of New York State" was published in 1860 by R. P. Smith of Syracuse, N. Y. It was compiled and written by J. H. French. Therein may be found much detailed information relative to the erection of the various counties and the boundaries, as well as the subdivisions thereof into towns. It contains tables of Colonial patents, purchases and land grants as well as tables of the more important later patents.

At present, four of the counties have registers of deeds, viz., Bronx, Kings, New York and Westchester. In the other counties of the State deeds are recorded in the office of the county clerk.

2. *Not Retroactive.*

It has repeatedly been held that the provisions of the recording acts are not retroactive and are not designed to change rights already vested.

A grant of land in the county of New York was made in 1804. A later grant of the same lands was made in 1852 and duly recorded in the register's office. It was contended that failure to record the grant of 1804 in the same office made it void as against the latter grant. As the earliest recording act in relation to deeds of land in the City of New York was Chapter 175 of the Laws of 1810, and as the general recording act was not passed until 1813 (both after the grant of 1804), the grant of 1804 was made at a time when there was no existing recording act. It was held in *Felix v. Devlin*⁴⁰ that the Legislature had no power to render invalid a deed which was good when made. When there was no recording act, subsequent legislation could not render a failure to record such a deed void as to subsequent purchasers.

To the same effect see *Hall v. Conklin*,⁴¹ which held that in 1803 there was no statute requiring a conveyance of lands in Orange County to be recorded. Lands in that county were conveyed in 1803 and in 1811 the same grantor conveyed an easement over the same land, such easement not having been reserved by him. Held to be immaterial that the grant of 1803 was not recorded until after the subsequent grant affecting the same lands made in 1811.

It is thus evident if one received a deed from a patentee at a time before it was necessary to record same in order to protect the grantee as against a subsequent purchaser from the patentee, that the first deed would be effectual as against a later deed from the patentee, regardless of time. This is on the assumption that neither grantee of the patentee took possession. So even to-day, in searching backward from the present claimant of title to a time before deeds were required to be recorded in order to protect against a subsequent purchaser from the same grantor, and finding a continuous recorded chain of title in one who was a grantee of

40. 90 A. D. 103; 86 N. Y. Supp. 12; 91 A. D. 613.

41. 138 A. D. 450; 122 N. Y. Supp. 967.

the patentee, there might be no protection against an earlier *unrecorded* conveyance from such grantee of the patentee or a subsequent grantee before the recording acts became effectual. There may always be an element of chance in buying wild, vacant forest lands patented before the recording acts contained a *penalty* clause, unless the purchaser goes into actual possession.

3. *Muniments of Title.*

If no penalty resulted from a failure to record a conveyance before the enactment of Chapter 78 of the Laws of 1798, and deeds executed before that date were not recorded, a purchaser had to rely on the original muniments of title. A person presently claiming title should produce these original unrecorded deeds. This is oftentimes impossible for the reason that a grantee might not have recorded his deed covering a large tract of land which he thereafter parcelled out by numerous conveyances. He would naturally hold the deed to himself, so long as he retained title to any of the lands described. On the sale of the last parcel he might deliver his deed to his last grantee. The other grantees would, therefore, have no evidence of their grantor's title.

4. *Subsequent Purchasers.*

A subsequent purchaser must be one "in good faith" and "for a valuable consideration." A *new* consideration must move from the purchaser. This would include a mortgage.⁴²

Pages might be written as to the relative rights of subsequent purchasers and those holding prior unrecorded conveyances. The cases cited are rather extreme and illustrate the application of the principle involved.

It is not a simple matter to determine beyond question whether a conveyance has been recorded. Sometimes records have been made in the wrong book. The recording of a mortgage in a book kept for recording deeds has been held to have no effect.⁴³

42. *Young v. Guy*, 87 N. Y. 457.

43. *Howells v. Hettrick*, 160 N. Y. 308.

See also *Gillig v. Maas*, 28 N. Y. 191, 214, 5.

F. PATENTS — WHERE RECORDED.*

At the outset it should be borne in mind that the courts have uniformly recognized a clear distinction between private and public grants. The former come under the general designation of conveyances and relate to any written instrument by which title to land or any interest or lien in or upon land is created or transferred from one individual to another.

Public grants on the other hand are instruments by means of which the sovereign power alienates title to sovereign property so as to vest it in an individual; they differ radically from a grant by a private individual.

Public grants *must be recorded* to be valid. This was the established law as early as 1664, when the Duke of York's laws were in effect. It was also the law of England that the Crown could alienate only by recorded instruments. It was continued in force by virtue of the Constitution of the State of New York.

The distinction between deeds between individuals and a grant by the State to an individual was pointed out in *N. Y. C. R. R. Co. v. B. B. Co.*⁴⁴ The history of Colonial and early State grants was considered at length. "The sovereigns of England never granted lands by deed. Their alienations were always of a higher character, being known in the law as alienations by matter of record. The grants were recorded in the proper office and the Great Seal was affixed to the transcript as evidence of the grant to the public. The letters of gift or transfer were thereby made *patent* or open to the world."

The same practice was followed in making the Colonial grants of land in this State.

The record in the proper office was not for the purpose of giving notice but in order to make the grant effectual. It was not necessary to deliver the letters patent to the patentee as is required in conveyances between individuals.

Colonial patents were recorded in the office of records at New York. The office of Secretary was established as follows:

* See also *B. C. & G. Anno. Con. Laws*, 2d Ed., Vol. 6, p. 6752.

44. 10 A. D. 387; 41 N. Y. Supp. 762; af. 158 N. Y. 470.

(a) Under the government of the Province of New Netherlands there was a "Secretary of the Province."

(b) Under the English Colonial Government, a "Secretary of the Colony."

(c) Under the State Government, a "Secretary of State."

In 1784 the office of the Secretary of State was located in the City of New York. About 1797 it was removed to the city of Albany.

It was held that the office of Secretary of State is the proper office for recording letters patent.

It has frequently happened that the same lands have been patented or granted by the State by successive letters patent or deeds or conveyances executed by State officers under statutory authority. Lands owned by the State may have been patented in the first instance, sold for unpaid taxes and conveyed to the State and again patented; or, after having been patented, appropriated by the State and again conveyed by State officers; or moneys may have been loaned on lands and the payment thereof secured by mortgages. Thereafter the State may have foreclosed the mortgages and bid in the property, following which the State may have again parted with title.

The question is presented as to whether a patent from the State, recorded in the office of the Secretary of State but not recorded in the office of the clerk of the county in which the lands affected are situated, constitutes notice to a subsequent purchaser of the same lands from the State; also as to the effect of recording a second patent from the State in a county clerk's office as against title arising from the first patent recorded in the Secretary of State's office only.

A record in the proper public office does not refer to the office of the county clerk or register. The proper office is that of the Secretary of State. The record in the Secretary of State's office is mandatory; the statutes for recording in the county clerk's or register's office are permissive.⁴⁵

⁴⁵ N. Y. C. R. Co. v. B. B. Co., 10 A. D. 387; 41 N. Y. Supp. 762; af. 158 N. Y. 470.

In order to record original letters patent in the office of the county clerk or register, the letters must be delivered. Although delivery is not essential to pass title, the practice has been to deliver to the patentee the original letters patent, and in *U. S. v. Schurz* (102 U. S. 378) it was held that the patentee could compel a delivery of letters patent by writ of mandamus.

Chapter 295 of the Laws of 1839 permitted the recording in the office of the clerk of any county, or the register of deeds in the City of New York, of a certified copy of the patent recorded in the office of the Secretary of State.

Chapter 110 of the Laws of 1845 specifically provided that "all letters patent issued under the Great Seal of this State," in addition to being recorded in the office of the Secretary of State may be recorded in the county where the lands granted were situated in the same manner and with like effect as a deed.

Section 295 of the present Real Property Law makes permissive the recording of letters patent in the office of a county clerk or register.

The present statute relating to the recording of letters patent in the office of the Secretary of State is Section 5 of the Public Lands Law and is mandatory.

A subsequent patentee should examine the records of the Secretary of State for all prior patents. He cannot avail himself of the protection of the recording acts. If one buys from the sovereign he must examine the records in the office where the sovereign's act of grant is made effective and ascertain whether or not the sovereign is still seised of the lands about to be patented.

Search should also be made in the office of the clerk of the county or register for patents recorded therein, although the recording acts may not be held to have the same force and effect with reference to patents as to private conveyances.

Section 291 of the present Real Property Law, in providing for the record of conveyances in the office of the clerk of the county, refers to a conveyance "duly acknowledged by the person executing the same or proved as required by this chapter." Letters patent are not so executed.

But it is to be noted that by Section 295 of the Real Property Law letters patent, when recorded in the county, have a "like effect" as a conveyance duly acknowledged or proved and certified so as to be entitled of record.⁴⁶

A patent issued by the State is not necessarily valid; if the State has no title to convey, it is void.⁴⁷

Section 6 of the Public Lands Law recognizes the possibility of a failure of title to lands patented.

G. INDEXES.*

For many years county clerks have been keeping indexes of deeds, mortgages and other recorded instruments. Various index systems have been devised and put in use. In making searches these indexes have been relied upon and may be the basis of the certificate made by the county clerk or by an abstract company when certifying to an official search. There have not always been legal provisions for the keeping of indexes and the record of a deed in a deed book or a mortgage in a mortgage book has been held to be notice as against a subsequent purchaser or mortgagee whether indexed or not. No one is absolutely safe in relying upon the indexes; strictly, each recorded instrument should be examined at least before 1896. But in practice, as this would be such an endless task and as the indexes are for the most part correct, they are being relied upon.

It was held in *Mutual Life Insurance Co. v. Dake* (1 Abb. N. C. 381), that "the index is not an essential part of the record for the purposes of notice; that a mortgage duly recorded, though not indexed, is constructive notice, even against a *bona fide* purchaser or mortgagee who dealt on the faith of finding no incumbrance in the index." This decision was in 1876 and reviews the history of the recording acts under the Colonial and State Governments. The expression is found that indexes "are designed, not for the protection of the party recording his conveyance, but for the con-

46. *Marsh v. N. P. Asso.*, 25 A. D. 34, 51; 49 N. Y. Supp. 384.

47. *Grace v. Town of N. Hempstead*, 166 A. D. 844; 152 N. Y. Supp. 122; *af. 220 N. Y.* 628.

* See also *NORR*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 4, p. 316. See *Weed's Practical Real Estate Law*, p. 920.

venience of those searching the records; and instead of being a part of the record, they simply show the way to the record." This case was affirmed in 87 N. Y. 256 (1881), which has been since cited with approval.⁴⁸

Wadsworth v. Board of Supervisors (217 N. Y. 484) (1916), also reviews the early legislation and states that "it was held as late as 1881 that the indexing of a mortgage is no part of the record thereof," citing the *Mutual Life Insurance Company* case.⁴⁹ The powers and duties of the county clerk are discussed and reference is made to Section 265 of the Real Property Law enacted in 1896, since re-enacted as Section 316 of the Real Property Law, being Chapter 52 of the Laws of 1909. Section 265 was revised from Chapter 199 of the Laws of 1843, which was in effect when the insurance company case was decided.

As the 1843 act required the clerks of the several counties to prepare proper books for making general indexes, which were held by the court not to be notice, the present act, which also requires county clerks to prepare indexes, cannot be held to be notice without the Legislature specifically so providing. Section 316 does not apply to a county having general numerical indexes.

It is the recording under Section 291 of the Real Property Law which constitutes notice and not the index.

As to indexing wills, see Section 316, Real Property Law, revised from Chapter 199, Laws of 1843, and Section 43 of the Decedent Estate Law, derived from Chapter 182 of the Laws of 1846, as follows:

"County clerk's index of recorded wills.—Upon recording a will or exemplification, as prescribed in the last section, the clerk or register must index it in the same books, and substantially in the same manner, as if it was a deed recorded in his office."

In *Parker v. Conner* (93 N. Y. 118, at page 124) Judge Rapallo stated:

48. *Manton v. B. & F. R. Co.*, 217 N. Y. 287.

49. 87 N. Y. 256.

"The doctrine of constructive notice has been most generally applied to the examination of titles to real estate. It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused; but if he fails to use due diligence, he is chargeable, as matter of law, with notice of the facts which the inquiry would have disclosed."

To the same effect see *McPherson v. Rollins* (107 N. Y. 316).

H. CONVEYANCES — WHEN RECORDABLE.*

Section 290 of the Real Property Law defines a "conveyance," it being every written instrument by which an estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected.

This presents the inquiry as to what written instruments, other than those by which an estate or interest in real property may be "created, transferred, mortgaged or assigned," may *affect title* to real property.

Some instruments have been recorded when not entitled to be recorded and if not entitled of record, the recording of same does not constitute a notice.

A deed lacking seals does not convey a legal title but does convey an equitable title. It will entitle the grantee to have the legal title conveyed to him by a proper instrument. If recorded, it has the same effect as against all persons dealing with the property, as a deed conveying a legal title.⁵⁰

A recorded instrument, when it is not a proper instrument for record, raises no presumption that one has notice of the instrument from the mere fact that it has been recorded. This conclusion was reached by the Court of Appeals in *Bradley v. Walker* (138 N. Y. 291), in passing upon the effect of a recorded agreement made by a married woman where "the certificate of acknowl-

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 7, p. 7496.

50. *Todd v. Eighmie*, 4 A. D. 9, 13; 38 N. Y. Supp. 304.

edgment does not state that she acknowledged it on a private examination apart from her husband freely and without any compulsion from him."

A deed of real property was executed by four grantors, only three of whom duly acknowledged same. The register of New York County refused to receive and record the deed in his office. The Trial Court in *People v. Donegan*⁵¹ supported his refusal. The Appellate Division⁵² affirmed. The Court of Appeals⁵³ reversed and held that the deed was entitled to be recorded and was effectual as to the three grantors; that as to the grantor whose acknowledgment was defective, the record would not be notice to subsequent purchasers; that if that person had been the sole grantor the deed could not have been lawfully recorded. Although the court stated that "the question is novel," defective acknowledgments are common.

It was held in *Tarbell v. West* (86 N. Y. 280) that where title to partnership lands was in the name of one partner only, the other partners had an equitable interest; that one taking title from the partner in whose name the title stood would be protected even as against a mortgage covering such lands given by another partner having such equitable interest.

Wade on the Law of Notice (2d Ed.), at page 80, contains a chapter on "Recordable Instruments." The following is found on page 82:

"An instrument which is not required to be recorded, nor even mentioned in the statutes among those which may be recorded, would not be regarded as one contemplated by the Legislature as a recordable instrument; consequently, should it be copied upon the records, such copy would not amount to constructive notice to anyone."

An "instrument" to be recordable in a book of deeds or mortgages must be "duly acknowledged." If not so acknowledged

51. 104 Misc. 223; 172 N. Y. Supp. 37.

52. 184 A. D. 763; 172 N. Y. Supp. 448.

53. 226 N. Y. 84.

and so recorded the record thereof in the office of the county clerk or register in a book of "Miscellaneous Records" is not notice to anyone. A subsequent purchaser is not affected thereby and a searcher is not bound to look for same. It has the same effect as an index, and if discovered may show the way to something else. It may indicate how a chain of title may be connected but does not of itself form a link in the chain.

Section 937 of the Code of Civil Procedure reads as follows:

"§ 937. WHAT INSTRUMENTS MAY BE ACKNOWLEDGED. Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property."

As an instrument affecting title to real property may be recorded in a deed book, if properly acknowledged, the question is presented as to what instruments mentioned in Section 937 of the Code, if acknowledged, may be recorded. This section is now section 194 of the Civil Practice Act.

There is no objection to reciting in a deed that the grantor is the "only heir at law." Such recital does not make the deed an improper one for record. Assume that an instrument contains a recital that the grantor in a recorded deed is the "only heir at law." Is such instrument, if properly acknowledged, recordable, although no lands are thereby conveyed? The answer may be found in giving to a deed containing a recital a two-fold effect — as an instrument transferring land and also affecting the title to land by furnishing a connecting link between the ancestor and the heir. Of course, the instrument containing a statement of heirship only must describe lands in order to show the lands title to which is affected thereby. On this theory an instrument containing a recital only may be recorded in a deed book.

Thompson on Title to Real Property, Section 500, specifies various instruments affecting title to real estate which may be recorded

as deeds. Among others are powers of attorney, party wall agreements and instruments creating easement rights and servitudes.

Assume that an owner of lands conveys same and the grantee loses his deed before record thereof, and the grantor refuses to give another deed and is not compelled so to do.⁵⁴ A statement by the grantor, duly acknowledged and recorded in a deed book, to the effect that he has given such prior deed, *may* be notice as against a subsequent purchaser. However, there *may* be a question as to whether such statement is recordable. The only effect of such a statement *may* be to estop the one making same from thereafter denying it. This question does not seem to have been decided.

I. CONSTRUCTIVE AND ACTUAL NOTICE.*

Although a recorded instrument, or an instrument filed in the county clerk's office, may not always be constructive notice, yet if discovered in making a search, it may constitute actual notice. In *Brokaw v. Duffy* (165 N. Y. 391) it was held that the plaintiff was not obliged to investigate and to find a notice of pendency of action; that it was his privilege to make an investigation for same and that it was his right so to do; that having done so, he was chargeable with whatever facts he discovered. "Those facts were not constructive, but actual notice to him, which he could not disregard in safety." A defect does not become less a defect because it would not have been discovered without the exercise of unusual diligence.

One is not protected in taking title by relying on the records in the county clerk's or register's office. To illustrate: If an original recorded instrument is forged, the record may afford no protection to a subsequent purchaser.

A purchaser must inspect premises for evidence of occupation. He cannot shut his eyes to matters which might give notice of a conflicting claim.

The recording acts at best provide merely instruments of notice,

54. *Kent v. Church*, 136 N. Y. 10.

* See *Weed's Practical Real Estate Law*, p. 914.

and are by no means exclusive. The principles laid down with respect to what constitutes notice are based upon the underlying rule that a purchaser is bound to take notice of all evidences of title (including recorded conveyances) which are open to him.⁵⁵

J. CONFLICTING CLAIMS OF TITLE.

The Attorney General can only express his opinion after an examination of title, which is not conclusive as against anyone claiming adversely thereto. This opinion must be to the effect that the person offering owns the whole or a part of the property offered or a specific undivided interest in and to the same or that he does not so own. If there is any conflict, the Attorney General cannot determine conflicting claims. Even though one of the contenders is willing to convey to the State for a small part of the value of the land, the Attorney General cannot approve such payment, for in order to do so he must approve such claim of title. One contender may convey to the other; the question of compensation must be arranged between them. The State can pay only one of the contenders; it cannot pay full value of the land to one and even a very small sum to another. The Legislature might authorize payment to a claimant in settlement of a claim, but in general it is for the court to settle these differences. The courts should decide which contender has the title. This is true if one of the contenders is the State.

Each may have an undivided *interest* but in case of a conflict as to the ownership of one and the same interest, one or the other is the owner. There can be no "fifty-fifty" title; neither can there be a *ninety-nine-one* title. As was said in *Thompson v. Burhans* (61 N. Y. 52, at page 67), "plaintiff either has a valid title or he has none."

The practice was indulged in at one time when an individual and the State claimed title to the same lands to settle the dispute by each taking a part. This practice came to the attention of the court in *People v. Santa Clara Lumber Co.* (213 N. Y. 61). The importance of this decision justifies more than a reference.

55. But see *Ebling B. Co. v. Gennaro*, 189 A. D. 782; 179 N. Y. Supp. 384.

It appeared that there was a conflicting claim of title by the State represented by the Forest, Fish and Game Commissioner, upon the one hand, and individuals upon the other, each claiming to own the same land. The individuals were in possession. The State commenced an action to determine title to the lands and later a written stipulation was made between the parties on which judgment was rendered dismissing the complaint on the merits. This stipulation provided, however, that the individuals should convey to the State a portion of the lands in controversy and that the individuals should have title to the remainder. Later, the People started the action above reported for the purpose of vacating the stipulation and judgment. The opinion states that under the stipulation, if valid, the State released or attempted to convey to the individuals title to State lands; that this could not be done; that State officers and agents may determine that the State does not own certain lands and may constitutionally abandon its claim thereto, but that they cannot assert title and while in that frame of mind release or convey it, as was done under the stipulation and judgment. One of two things was necessary, either a decision on the part of the State officers and agents that the State did not own the land, followed by an abandonment of its claim, or a decision of the courts that the State did not own the land. It was also held that the State was not estopped from questioning the original stipulation and judgment; that the doctrine of estoppel cannot be invoked against the State in support of unauthorized acts on the part of the officers and agents of the State.⁵⁶

The same principal was involved in *People v. Witherbee*.⁵⁷

These decisions sustain the conclusion that the Attorney General cannot approve a title in an individual or payment to an individual who claims a title, if the State also claims title to the same lands. The State must first "through its proper officers and agents" determine in good faith that it does not own the lands and abandon its claim to them.

56. *People v. Thistlethwaite*, 134 A. D. 876, 80; 119 N. Y. Supp. 690. *M. T. Co. v. Tax Comm.*, 220 N. Y. 344.

57. 178 A. D. 368; 164 N. Y. Supp. 915; af. 228 N. Y. 535.

K. APPROVAL OF TITLE.*

It frequently happens that the person offering lands to the State has not a continuous chain of title from the original patentee, and in many instances his title is based on a Comptroller's tax deed. The subject of tax sales and the effect thereof and of deeds issued by the Comptroller or other officials pursuant thereto, will be later considered.

As pointed out, the Attorney General must approve or disapprove a title which he is called upon to examine.

If the Attorney General approves, it becomes his duty to secure from the owner a conveyance to the State which is also subject to his approval. On the approval and recording of this conveyance, title vests in the State, and on certification by the Attorney General to the Conservation Commission and the delivery of all title papers to the Conservation Commission, payment may be made for lands offered.

The Attorney General may approve title to only a part of the lands offered and the Conservation Commission and the Commissioners of the Land Office may proceed with the acquisition of the lands title to which has been so approved, leaving the balance of the land for further consideration.

If the Attorney General disapproves a title, the Conservation Commission may recommend to the Commissioners of the Land Office the appropriation of the lands.

1. *Searches.*†

Before the Attorney General can approve a title, he must, among other things, secure the following:

(a) A State Comptroller's search for unpaid taxes and tax sales.

(b) Copy of letters patent covering lands involved.

(c) Search or abstract of title made and certified by a county clerk, register or title insurance, abstract or searching company, organized and doing business under the laws of this

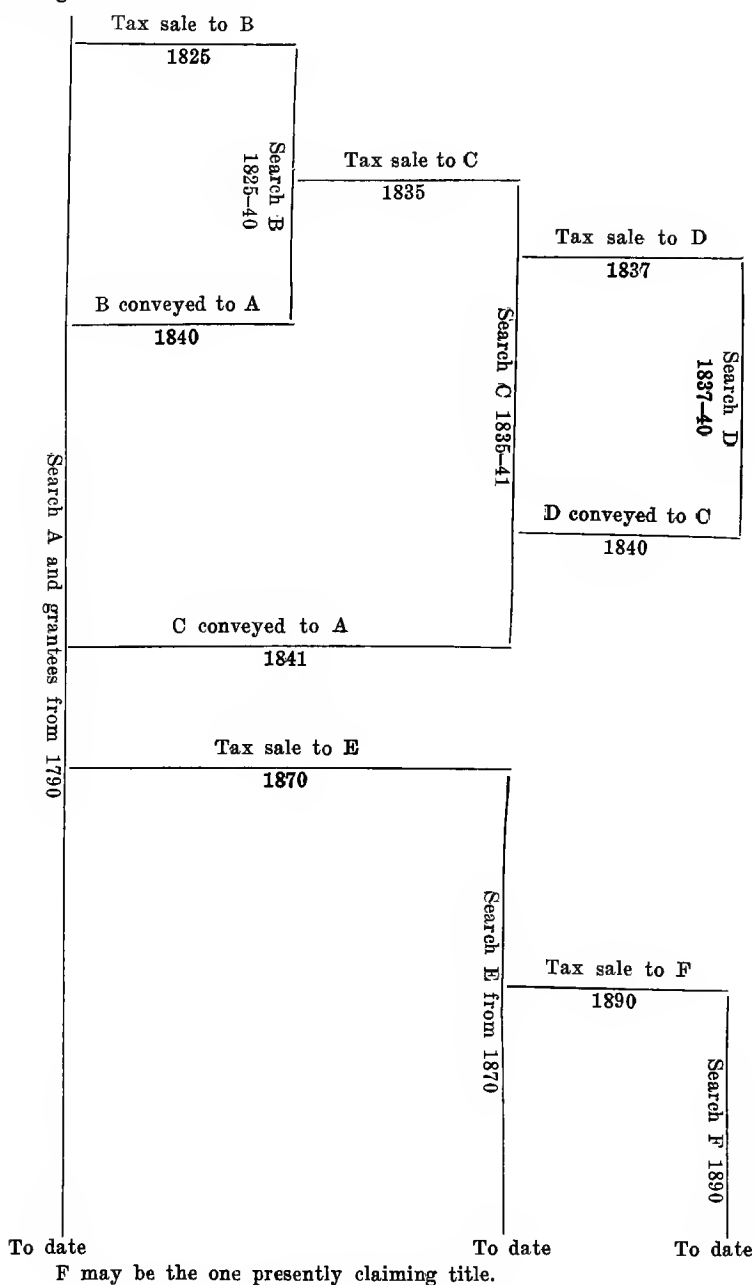
* See also Weed's Practical Real Estate Law, p. 1133.

† See also Weed's Practical Real Estate Law, p. 1133.

State.⁵⁸ This search is made from an examination of the indexes and is supposed to contain a reference to all conveyances affecting the title to premises in question. It should show all links in the chain of title from the original patentee to the present claimant and if in the meantime the Comptroller has issued one or more tax deeds which may or may not be effectual and valid against the patentee or those claiming under him, thereby possibly starting a new chain of title, it should show all conveyances in that chain and all conveyances in as many chains as might have been so started by tax deeds. To illustrate:

58. See Section 3256, Code of Civil Procedure; sections 385, 1490, Civil Practice Act.

Patent granted to A 1790



(d) A county treasurer's search for unpaid taxes and tax sales.

(e) Search for United States judgments and bankruptcy of parties.

(f) Search as to the payment or nonpayment of State, county and school taxes, including all such as are liens to the time of recording the deed to the State.

2. *Taxes.*

The question has frequently arisen between a grantor and grantee as to which is liable for the payment of taxes where the assessment was made and completed before the transfer of title, while the rate was not fixed and the amount of taxes determined and the warrant for the collection thereof issued until after the transfer. If the assessment is primarily a personal obligation, *i. e.*, if it is made under a law by which the person assessed is primarily liable, and has been completed before the transfer of title, the tax should be collected from the grantor and if so collected, in the absence of an agreement on the part of the grantee to pay the tax, the grantor would have no remedy against the grantee. But, if the collector fails to collect from the one assessed, *i. e.*, the grantor, the land becomes liable and the grantee is bound to pay a tax levied and which becomes a lien after the transfer. He cannot recover against his grantor even under a warranty deed containing a covenant against encumbrances, as there was no encumbrance at the time of the transfer. The grantee has no remedy against the grantor unless the grantor had covenanted to pay.

The same rule applies where the land is, under the law, primarily liable, as in such a case there is no obligation on the part of the grantor to pay a tax levied after the transfer of title.

Assessors have been charged with the duty of examining lands, fixing the value thereof and determining whether occupied or not or owned by a resident or not. The determination must be made as of July 1st each year. They were then allowed one month in which to prepare and complete the assessment roll, but when completed it would take effect as of July 1st. If land was properly assessed as resident land to an owner or occupant as of July

1st, a primary personal obligation resulted as against the person assessed. As to land owned by a nonresident and not occupied, the assessment was against the land which would be primarily liable.⁵⁹

3. *Instruments Necessary.*

(g) A definite and certain description of land involved is required. This sometimes requires a survey and map. All descriptions are subject to the approval of the Comptroller.

(h) Lands to be acquired should be inspected and a report made as to physical conditions of same, especially as regards roads, structures and evidences of occupation.

(i) An affidavit of title should be secured from the person offering lands. The affidavit should cover questions of occupation, leases, easements, etc. A general form will be found in "Appendix X-a" and "X-b."

(j) Deed from the owner and his wife, if any, properly executed, with the necessary revenue stamps affixed, should be secured. This deed must be approved by the Attorney General as to form and manner of execution.

(k) Receipted voucher is necessary under Chapter 569 of the Laws of 1916. Same must be approved by the Conservation Commission, Commissioners of the Land Office and Attorney General.

4. *Maps.**

As an incident to the examination and approval of title, it becomes necessary to examine and pass upon the effect of maps, which may or may not accompany a conveyance in the chain of title or which may or may not be filed or found in the proper

59. Sections: 20, 9, 36, 38, 39, 58, 59, 69, 71, 82, **Tax Law.**

Rundell v. Lakey, 40 N. Y. 513.

Clark v. Norton, 49 N. Y. 243.

Barlow v. S. N. N. B., 63 N. Y. 399.

Overing v. Foote, 65 N. Y. 263.

Haight v. Mayor of N. Y., 99 N. Y. 280.

Lathers v. Keogh, 109 N. Y. 593.

Matter of Babcock, 115 N. Y. 450.

* See **Weed's Practical Real Estate Law**, p. 710.

depository for such maps. The Attorney General may be called upon to determine whether such a map may be received in evidence as an ancient document. To authorize a map to be received in evidence as an ancient document, it must appear upon the face of the map to have been executed by competent authority and it must have been found in a proper depository or have been made or referred to as a part of the muniments of title. Where the maker of a map, embracing large areas of land, is dead, and the map has been generally and publicly recognized as correct by those claiming lands shown thereon, it may be received in evidence.

A map is merely a delineation of courses and distances and may be properly used to show in a more intelligible form the extent and location of lands described in a conveyance. It is immaterial when or by whom it was made.

A certified copy of a map may be accepted with the same force and effect as an original map.⁶⁰

5. *Certified Copies of Records and Papers.*

If a certified copy of a record, paper or map is presented to the Attorney General in support of a title, same may be given the same consideration as if the original had been produced although the original might have been destroyed. Section 933 of the Code provides when certified copies might be received in evidence. If a record, paper or map is in such form and properly certified so that it might be received in evidence, the Attorney General might accept and file same with the Comptroller for future reference and use.

6. *Acknowledged Instruments.*

Section 937 of the Code of Civil Procedure reads as follows:

"Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of

60. *Donohue v. Whitney*, 133 N. Y. 178.

CODE references. See Author's Note and Distribution Table—page xxiv.

real property; and thereupon it is evidence, as if it was a conveyance of real property."

It does not appear that this section has been taken advantage of very generally and the real merit of the section may be more or less open to question. It gives to the instrument, although not necessarily in form a deed, when properly acknowledged, the same force and effect as a conveyance of real property. The question arises as to what is meant by the word "instrument." The following may serve as illustrations:

1. If a person holds a deed of lands, which he assumes to be void, he might by an instrument in writing, duly acknowledged, renounce any claim of title under such deed.

2. If a person has conveyed land and the deed has been lost, he might execute an instrument reciting the fact of such conveyance and describing the lands previously conveyed and giving the name of the grantee. Such an instrument, properly acknowledged, might have the effect of a written conveyance to such grantee.

3. A recital in a deed may be evidence of the fact recited. Instead of reciting the fact in a deed, it might be stated in a separate instrument, duly acknowledged, which would have the same force and effect as a recital in a deed. This would cover a recital of heirship.

Such instruments, when properly acknowledged, might be recorded and have the same force and effect as a recorded conveyance of real property.

As to what instruments are entitled to be recorded and whether if recorded they constitute constructive notice presents a further question.

Section 291 of the Real Property Law provides that "a conveyance of real property * * * on being duly acknowledged by the person executing the same * * * may be recorded in the office of the clerk of the county where such real property is situated."

Section 290 of the Real Property Law (Paragraph 3) defines a "conveyance" as including "every written instrument * * * by which the title to any real property may be affected."

If the title to real property may be "affected" by the instruments mentioned in the three illustrations cited, the county clerk, on tender of the lawful fees therefor, would be obliged to record same in his office and the record thereof would be constructive notice.

Under the Revised Statutes of Texas (1879), which authorized a record of all instruments of writing concerning any lands, it was held in *Peterson v. Lowry* (48 Texas 408) as follows:

"A written acknowledgement by the grantee of a land certificate already located, that he had previously sold and conveyed it, is an instrument relating to lands, and, as such, proper to be recorded. When duly recorded, it is notice to subsequent purchasers from the maker of such instrument."

The three illustrations all involve instruments in the nature of declarations against interest. An instrument containing a declaration in favor of the declarant would not be in the nature of a conveyance of real property, and could not affect the title to real property. It would be a naked, self-serving declaration, unless it could be regarded as an ancient document.⁶¹

As a further illustration of the effect of an acknowledged instrument on the title of real property, a case arose where an owner of lands died intestate, leaving books and records showing a conveyance by decedent of a particular parcel to a particular person, who had subsequently conveyed. No deed to such person had been recorded or could be found, resulting in a missing link in the chain of title. The heirs of the decedent refused to execute a deed of the lands but they did execute a statement which was duly acknowledged, reciting that their ancestor had previously conveyed, basing their information on the records of such ancestor.

61. *Hamerslag v. Duryea*, 58 A. D. 288; 68 N. Y. Supp. 1061; af. 172 N. Y. 622.

The declaration contained the name of the ancestor, the names of the heirs and a description of the property, It was properly acknowledged and an instrument affecting title to real property. It was properly recorded and became constructive notice to anyone who might take a conveyance from such heirs. It would also constitute constructive notice to one taking a subsequent deed from anyone claiming under the decedent other than the presumed grantee of the decedent, that is, the one to whom the records of the decedent showed he had conveyed.

7. *Presumption of Title.*

Where a person has for a long period of time exercised rights of ownership not amounting to adverse possession, which might have had a lawful origin by grant and the exercise of which naturally would have been prevented by other persons if the exercise of such rights had not been lawful, the presumption arises that the right was created by a proper instrument. Such instrument might have been lost or mislaid and not recorded, or given at a time when recording was not required.

In *Pierre v. Fernald* (26 Me. 435) it was said:

“The principle, upon which the presumption of grants or other contracts for the security of rights and easements is made, is, that when one person knowingly permits another for a long course of years and without molestation or interruption to claim and enjoy rights, easements or servitudes, injurious to him or his estate, it would be against man’s experience, and contrary to his motives of conduct, to account for it so satisfactorily in any other manner, as to presume, that he had authorized it by some grant or agreement.”

“When it appears that the enjoyment has existed by the consent or license of the person who would be injured by it, no such presumption can be made.”

In the latter part of the eighteenth century, many grants of large tracts of land within the State were made. Frequently, a tract was granted to several patentees who took the land as tenants in common. Later, the several tenants in common would convey

to one of their number or to a stranger, in trust. A map would be made of the land and lots would be indicated thereon. These lots would be drawn by the several patentees, following which the grantee in trust would convey the lots to the persons drawing same, who would thereupon become owners in severalty as distinguished from tenants in common.

In some instances, all of the patentees did not convey to the trustee or, if they did, the conveyances cannot be found. Such a situation was involved in *Doe v. Campbell* (10 Johnson's Rep. 474). The patent was issued to twenty persons and dated in 1765. All of the patentees, except two, released to one person for the purpose of making partition, leaving outstanding an undivided 2/20ths interest. It was stated by the court that since there was proof of title to at least 18/20ths of the premises "the jury would have been warranted in presuming a title even to the remaining two parts."

A similar question was present in *Jackson v. Moore* (13 Johnson's Rep. 513). The patent was granted in 1764 to 24 persons. The next year a partition was made among the then proprietors. It did not appear that all of the original patentees had released and conveyed to the trustee, who had covenanted to execute releases in fee to the respective owners of the lots according to the partition, but it was held that, after a lapse of about fifty years, title to the whole premises might be presumed. Several actions involving similar questions were before the court, being actions in ejectment. Title was presumed in the plaintiffs excepting in cases where the lands were actually and adversely held by others.

Such were the presumptions indulged in by the courts 100 years ago. Time has only helped to strengthen them.

An interesting opinion by the Chief Judge of the Supreme Court of Pennsylvania delivered in 1852 is reported in 18 Pa. State Rep. 283, 95.⁶² It was urged that the presumption of law as to a title may become conclusive. The following is quoted from the opinion:

62. *Strimpfler v. Roberts*.

“ We are now asked to determine the rights of the parties, on such facts as can be fished up from the oblivion of more than half a century. Nearly two generations have lived on the earth, and been buried in its bosom, since this business was transacted. Of the men who were then in active life, and capable of being witnesses, not one in twenty thousand is now living. Written documents, whose production might have settled this dispute instantly, have been, in all probability, destroyed, or lost, or thrown away as useless. The matter belongs to a past age, of which we can have no knowledge, except what we derive from history, through whose medium we can dimly discern the outlines of great public events, but all that pertains to men’s private affairs is wholly invisible, or only visible in such a sort as to confound the sense and mislead the judgement. ‘No man,’ says Mr. Justice Sergeant (2 Watts 115), ‘ought to be permitted to lie by while his rights can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry.’ For such reasons as these it is, that every civilized society has fixed a limited time, within which all rights must be prosecuted. Where this is not done by positive enactment of the Legislature, the judiciary calls in the aid of presumption; and courts of equity, though not bound by the statutes of limitation, close their doors against stale demands, as sternly as courts of law.

“ Time will raise presumptions as conclusive for or against an original title, as it will in other cases. We have as little power to read the ashes of burnt papers, or call dead witnesses from their graves to testify in a dispute about business transacted by the land-jobbers of the last century, as we would have if the controversy was on any other subject.”

Where the owner of lands not actually occupied, and of no particular value at the time, conveys same by deed which is in such form as to make uncertain the exact location of one of the

boundaries, "the presumption must be that it included all" of the tract of land owned by the grantor.⁶³

In the year 1898, Section 960 was added to the Code of Civil Procedure. It was amended in 1906. It provides in substance that in all actions to recover the possession of or to determine the title to or for trespass upon unoccupied or timber lands, the plaintiff need show an unbroken chain of title or conveyance to himself for only thirty years next preceding the commencement of the action or the commission of the trespass. Such proof shall be presumptive evidence of ownership by the plaintiff. The burden is then cast upon the defendant to show ownership of the lands in some person other than the plaintiff.

This section was considered in *Cravath v. Baylis*.⁶⁴ The action was trespass upon lands not actually occupied. The plaintiff showed a chain of title covering a period of about 75 years but not starting with a patent. The defendant claimed "isolated acts of user." The court held that plaintiff's paper title was "good enough to establish the presumption that he was the owner at the time of the trespass"; that the defendant "not showing any paper title could not overcome the presumption in favor of the plaintiff by anything less than proof of ownership in himself or some person other than the plaintiff, and this could not be done by evidence of occasional cutting of hay or gathering driftwood upon the premises. Adverse possession, in the absence of a paper title, cannot be established except by actual continued occupation of premises."

Section 960 of the Code was again considered in *Ridgway v. Hawkins*.⁶⁵ Like the *Cravath* action, it was for damages for trespass on unoccupied land. The plaintiff showed an unbroken chain of title back to 1745. Defendant showed a chain of title beginning in 1828. Title was presumed to be in the plaintiff.

In *M. M. Co. v. W. R. Co.*,⁶⁶ plaintiff claimed to be the owner

63. *Cravath v. Baylis*, 113 A. D. 666; 99 N. Y. Supp. 973; af. 192 N. Y. 559.

64. 113 A. D. 666; 99 N. Y. Supp. 973; af. 192 N. Y. 559.

65. 123 A. D. 15; 107 N. Y. Supp. 416.

66. 142 N. Y. Supp. 1094.

CODE references. See Author's Note and Distribution Table—page xxiv.

in fee. He brought an action under Section 1638 of the Code to compel the determination of the adverse claim which the defendant made under a tax deed. There was no actual possession of the premises involved in the suit and the question was presented as to whether the plaintiff had constructive possession, so that the action might be maintained. Plaintiff proved a chain of title extending back more than thirty years. It was held that under Section 960 of the Code this created a presumption of title in plaintiff and a constructive possession by plaintiff; that plaintiff was entitled to the judgment asked for. It was further held that had the defendants proven possession by some other person, their defence would have been made out.

The Court of Appeals held that proof by plaintiff of an unbroken chain of title since the year 1818 "was presumptive evidence of ownership" under Section 960 of the Code.⁶⁷

Evidence of possession by those in whom title is presumed will strengthen the presumption, especially in the absence of any pretence of claim in opposition. By this is not meant such a possession as to constitute adverse possession. Adverse possession for twenty years would alone be sufficient. Any possession which would be likely to arouse opposition by another would be sufficient to strengthen the presumption.⁶⁸

The distinction between a possession under a claim of title and the act of claiming title was pointed out in *Green v. Horn* (207 N. Y. 489).

If after the plaintiff shows a chain of title for thirty years, the defendant should show a chain of title for a longer period, the question arises as to whether the defendant would have overcome the presumption of title in plaintiff, or whether the presumption would still hold good.

Another rule might then apply in an ejectment action, that the plaintiff must succeed on the strength of his own title and not on the weakness of that of his adversary.⁶⁹

67. *Bryan v. McGurk*, 200 N. Y. 332.

68. See *McKinnon v. Bliss*, 21 N. Y. 206.

69. *People v. Inman*, 197 N. Y. 200, 5.

Judd v. Chilson, 177 A. D. 121; 163 N. Y. Supp. 695.

CODE references. See Author's Note and Distribution Table — page xxiv.

This rule would not apply, however, in an action to determine title.⁷⁰

Under the authority of *Ridgway v. Hawkins* (123 A. D. 15) it would appear as if the plaintiff *need* only show a longer chain of title than that shown by defendant. But this case does not hold that plaintiff *must* show a longer chain of title.

In the last analysis the inquiry is presented, whether in an action in ejectment or trespass or to determine title, the plaintiff by proving title for thirty years under Section 960 of the Code, must succeed unless defendant shows a chain of title connecting with the patent or an *earlier* adverse title by prescription. It must be borne in mind that this section only applies in case of lands "unoccupied" at the time except for the entry or trespass complained of. (Section 335, Civil Practice Act.)

It seems that if one has a chain of title to lands covering a long period of time, say fifty or more years, and enters upon such lands, he should not be regarded as a trespasser as against one who has only a thirty-year chain of title. The entry should not be deemed unlawful excepting as against one having a chain of title connecting with the patent. If, however, neither party connects with the patent, the one showing the longer chain of title might be held to be entitled to greater consideration and to prevail whether he makes the first entry or not. The *Ridgway* case would support such a conclusion.

(a) Power of Attorney.*

The execution of a valid power of attorney will be presumed in favor of an ancient deed purporting to be executed by an attorney more than thirty years ago, even though the power of attorney is not produced and no proof given that it ever existed.⁷¹

8. Marketable Titles.†

When the State seeks to acquire title to lands for State park purposes by purchase, the first step is an agreement between the

70. *N. P. A. v. Lloyd*, 167 N. Y. 431.

* See also *Weed's Practical Real Estate Law*, p. 841.

71. *Goodhue v. Cameron*, 142 A. D. 470, 5; 127 N. Y. Supp. 120.

† See *Weed's Practical Real Estate Law*, p. 715.

person claiming to own such lands and the Conservation Commission. Such agreement is made in writing and the alleged owner agrees to sell and convey by warranty deed, free and clear from all liens and encumbrances, the lands desired by the Conservation Commission.

It was held in *Irving v. Campbell* (121 N. Y. 353) that "it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title."

In the opinion of Chief Judge Ruger, in *Irving v. Campbell*, the authorities on the subject of a marketable title were reviewed and discussed. To quote from the opinion:

" 'A good title means not merely a title valid in fact, but a marketable title, which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence.' 'A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding.' * * *

" 'It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing influences.' "

It was pointed out that in the absence of a good record title, the purchaser might necessarily be driven to rely for a defense upon parol evidence which might then be accessible or not, according to circumstances beyond his control.

The Court of Appeals in *Heller v. Cohen* (154 N. Y. 299) stated rules applicable to the question under discussion as follows:

"To entitle a vendor to specific performance, he must be able to tender a marketable title. A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused.

"So, where there is a defect in the record title which can be supplied only by resort to parol evidence, and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract."

Volumes have been written on the subject of marketable titles, but a few of the leading cases, including those cited and *Hilliker v. Rueger* (219 N. Y. 334), state the principal rules governing the marketability of a title.

In case of a defect in the record title, the vendor may show a title by adverse possession. The purchaser, by taking and continuing in possession for a period of twenty years, might stand upon same regardless of the earlier possession, even though he should fail in his proof of an earlier possession.

A vendor who bases his title on adverse possession, and delivers affidavits in support thereof to the purchaser, might place the purchaser in a position where he should complete the purchase.

It was stated in *C. P. A. v. Gouraud* (224 N. Y. 343, 50) that "titles by adverse possessions are in disfavor with persons contemplating the purchase of property and the courts. * * * There are, however, cases where title by adverse possession has been upheld on satisfactory undisputed parol evidence."

If the possession by the purchaser should be later attacked, he would be obliged to prove earlier adverse possession regardless of any affidavits which he may have. Such affidavits would simply serve to assist him in securing witnesses to prove necessary acts of earlier possession.

The State in acquiring lands for park purposes does not take actual possession and must rely upon the record title of the person from whom the purchase is made. In case the vendor has not a complete record title and bases his claim of title on adverse possession and submits affidavits in support thereof, such affidavits should be perpetuated.

In *People ex rel. Smith v. Sohmer*⁷² it was held that claimant should have a marketable title to lands in order to secure the full value thereof.

Sixth. Appropriation.*

Both Chapter 451, Laws of 1916 (known as the Conservation Law), and Chapter 569, Laws of 1916 (known as the Referendum Act), provided for the acquisition of lands by appropriation. Such appropriation may be made on the recommendation of the Conservation Commission *if it is not able to agree with the owner as to the value of the land and the amount to be paid, or in case the Attorney General does not approve title* in the one offering to sell and convey the lands to the State at a price satisfactory to the Conservation Commission.

Under the Conservation Law (Section 59) the approval of the Governor is required. Under the Referendum Act, the consent of the Commissioners of the Land Office in writing is required to be filed in the office of the clerk of the county where the lands are situated.

The Referendum Act made the provisions of the Conservation Law applicable in case of an appropriation, excepting that the consent of the Commissioners of the Land Office was substituted for the approval of the Governor. It is therefore necessary to turn to the Conservation Law for the purpose of finding the procedure under which appropriations are made.

Under the Conservation Law of 1916 (Section 59, Paragraph 2) provision was made for the making of an accurate description of land appropriated by the Commission and the endorsement thereon of a notice of appropriation to be filed in the office of the Secretary of State.

⁷². 163 A. D. 830; af. 215 N. Y. 709.

* See generally, Nichols on Eminent Domain, 2d Ed.

A. SERVICE OF NOTICE.

The question of service of notice and the effect thereof was considered generally in Chapter X — Barge Canal Lands, First, K.

Paragraph 3 of Section 59 of the Conservation Law reads as follows:

“Service of Notice. The said commission shall thereupon cause a duplicate of said description and certificate, with notice of the date of filing thereof in the office of said secretary of state, to be served on the owner or owners of the lands, forests, and rights in timber upon such lands and waters so appropriated; and from the time of such service the entry upon and appropriation by the people of the state of the property described in such notice shall be deemed complete, and thereupon such property shall become, and be, the property of the people of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state; but the service of such notice shall raise no presumption that the lands, forests, and rights in timber upon such lands described therein are private property.”

As to who is an owner, see Chapter X — Barge Canal Lands, First, K.

The effect of the service of notice of appropriation was considered at length in *People v. A. R. Co.* (160 N. Y. 225).

B. MANNER OF SERVICE.

Under the Conservation Law of 1916, service of notice was required to be personal if the person to be served could be found within the State. If such service could not be made and if the Conservation Commission so certified, and if the person to be served was one mentioned in Section 438 of the Code of Civil Procedure, it was necessary to secure an order for service of the notice by ‘publication following the provisions of Article Second, Title I, Chapter V, of the Code of Civil Procedure.

CODE references. See Author's Note and Distribution Table — page xxiv.

This necessitated a delay during the time of the publication of the notice, as well as the expense thereof following the securing of the order therefor, which resulted in an amendment by Chapter 290 of the Laws of 1919, which provided as follows:

4. Manner of service. Service of the notice and papers provided for under subdivision three must be personal if the person to be served can be found within the state. If the said commission shall not be able to serve said notice and papers or to cause the same to be served upon the owner or owners personally within the state, after making an effort so to do which said commission shall deem to be reasonable and proper, service may be made by filing said notice and papers in the office of the county clerk of the county wherein the property so appropriated is situated and by causing such notice and papers to be recorded in the books used for recording deeds in the office of said clerk. On the filing of said notice and papers with said clerk, it shall be the duty of said clerk to record same in the books used for recording deeds in the office of said clerk and to index the name of the person or persons to whom said notice is directed as a grantor in an index book to be kept by said clerk.

In case such service is made by filing said notice and papers in the office of the county clerk, any person so served may at any time thereafter file a claim with the court of claims, against the state, notwithstanding the two years' limitation provided by this article or by article one, title 3 of chapter III of the code of civil procedure, excepting that if the person so served shall be brought in and made a party to any claim or proceeding pending in the court of claims or before a referee having jurisdiction to hear, try or determine a pending claim, such person so brought in and made a party shall not thereafter file a claim against the state on account of such appropriation, in addition to or in substitution for the claim to which he has been made a party, unless he shall file such additional or substituted claim within three months from the time he is so brought in and made a party.

Further provision was made for recording notice and proof of personal service thereof, as follows:

5. Description and certificates to be recorded. If service be personal, the said commission shall thereupon cause a copy of such notice and papers, together with an affidavit of due service thereof on such owner or owners to be filed and recorded in the same manner as provided in subdivision 4 and it shall be the duty of said clerk to record in the books used for recording deeds in the office of said clerk and to index the name of the person or persons to whom said notice is directed as a grantor in an index book to be kept by said clerk.

C. ADJUSTMENT AFTER.

If the ownership of the property is such that there are one or more adult persons who could convey and give a good and sufficient deed of conveyance, and if such owners agree with the Conservation Commission as to the value of the property appropriated, Paragraph 6 of Section 59 of the Conservation Law provided a method of agreement as follows:

6. Adjustment of claims by agreement. Claims for the value of the property appropriated, and for legal damages caused by any such appropriation, may be adjusted by the commission, if the amount thereof can be agreed upon with the owner or owners thereof. Upon making any such adjustment and agreement the commission shall deliver to the comptroller a certificate stating the amount due to said owner on account of such appropriation of his land or other property, and the amount so fixed shall be paid by the treasurer upon the warrant of the comptroller.

An opinion by Attorney General Charles D. Newton, rendered June 9, 1919, is to the effect, however, that if the appropriation was under Chapter 569 of the Laws of 1916 instead of Chapter 451 of that year, no such agreement could be made without the consent and approval of the Commissioners of the Land Office.

Subdivision 6 of Section 59 of the Conservation Law was

amended by Chapter 206 of the Laws of 1921, so that it now reads as follows:

6. Adjustment of claims by agreement. Claims for the value of the property appropriated, and for legal damages caused by any such appropriation, may be adjusted by the commission, even though a claim has been filed with the court of claims, if the amount thereof can be agreed upon with the owner or owners thereof. Upon making any such adjustment and agreement the commission shall deliver to the comptroller a certificate stating the amount due to said owner on account of such appropriation of his land or other property, and the amount so fixed shall be paid by the treasurer upon the warrant of the comptroller. If the property was appropriated pursuant to the provisions of chapter 569 of the laws of 1916 and acts supplemental thereto or amendatory thereof, such adjustment shall be subject to the approval of the commissioners of the land office.

In case of a failure to agree the Court of Claims shall have jurisdiction. The method of operation will be found under the heading "Part Four — Compensation — How Acquired by the Individual," hereinafter set forth.

The owner of lands appropriated may reserve timber thereon within certain restrictions. Provision is made by Section 59 of the Conservation Law, Paragraphs 9 and 11. (See Chapter XIII, Third, B, hereof.)

D. COURT OF CLAIMS.

For procedure before the Court of Claims in case a claim is filed with that court, see Chapter XXVI hereof.

CHAPTER XIV.

River Improvement and Water Regulation.

- First. River Improvement.
- Second. Storage Reservoirs.
- Third. Drainage.
- Fourth. Union Water Districts.
- Fifth. Saratoga Springs Reservation.

First. River Improvement.*

(Chapter 647, Laws of 1911.)

The River Improvement Commission was established by Chapter 734 of the Laws of 1904, as a permanent commission for the regulation of the flow of water courses in this State, in aid of the public health and safety.

A State Water Supply Commission was created in 1905 and in the following year, 1906, the powers and duties of the River Improvement Commission were transferred to it.

The State Boards and Commissions Law (Chapter 56 of the Laws of 1909 and Chapter LIV of the Consolidated Laws) re-

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 1292.

Chapter 647 of the Laws of 1911 was substantially amended by Chapter 499 of the Laws of 1921, which created a Water Power Commission consisting of the Conservation Commissioner, the Attorney General and the State Engineer.

Chapter 647 of the Laws of 1911 was also amended by Chapter 579 of the Laws of 1921 by inserting a new article creating the New York Water Power Commission, the members of which shall be the same as under Chapter 499 of the Laws of 1921, together with the Temporary President of the Senate and Speaker of the Assembly. This Commission is authorized to issue licenses for the development of the water powers in which the State has a *proprietary* right or interest.

enacted the substantial provisions of Chapter 734 of the Laws of 1904.

By Chapter 647 of the Laws of 1911, the powers and duties conferred by the earlier acts were transferred to the Conservation Commission and may now be found in Article VII of the Conservation Law.

The Act of 1904 authorized the River Improvement Commission to acquire lands by the exercise of the power of eminent domain. The constitutionality of the act was attacked on the ground that lands might be entered upon and permanently occupied without previous payment therefor, and that it failed to provide for reasonable notice to the persons interested. The constitutionality was upheld by the Court of Appeals in *State Water Supply Commission v. Curtis* (192 N. Y. 319) for the expressed reason that the act did not authorize the permanent occupation of lands without previous payment of the fair value thereof.

The scope of the Act of 1904 and the powers conferred by and under it was again before the court in *People v. W. S. Com.* (209 N. Y. 299), and it was held that an improvement is not invalid even though it incidentally involves "the drainage of adjacent lands."

The Conservation Law (Sections 406-423) defines the procedure which must be followed, viz.:

- Petition for the improvement;
- Determination upon the petition;
- Proceedings upon approval of petition;
- Creation of improvement districts;
- Proceedings following final order;
- Entry upon lands necessary for the improvement;
- Special steps must be taken if the lands constitute a part of the Forest Preserve;
- Manner of making compensation;
- Issuance of bonds;
- Apportionment of cost;
- Assessment and collection of cost.

Second. Storage Reservoirs.*

(Chapter 662, Laws of 1915.)

This chapter added Article VII-A to the Conservation Law and provided for river regulation by storage reservoirs.

Under this act river regulation districts may be created and the Governor may appoint boards consisting of three persons. Such board may enter upon lands for the purpose of making surveys and examinations and may acquire and hold such real estate as may be necessary either by agreement or condemnation. Title to property shall be taken in the name of the State of New York. (Section 446.)¹

Third. Drainage.

(Article VIII, Conservation Law.)

The Conservation Commission is also empowered to drain lands and cause drainage improvements to be made. (Sections 480-491, Conservation Law.) To this end the Commission may enter upon necessary lands, structures and waters and temporarily or permanently use and occupy same for the purposes of the improvement. A fee or an easement may be taken and the amount to be paid therefor determined by agreement or in condemnation proceedings.

Fourth. Union Water Districts.

(Article IX-A, Conservation Law.)

Union water districts may be formed pursuant to Sections 530-539 of the Conservation Law. The Conservation Commission may enter upon any land or water for the purpose of making surveys, examinations and investigations, and is empowered to purchase or acquire lands and waters by condemnation and to take possession of same in the name of the "People of the State of New York." (Section 533.)²

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 1308.

1. Phelps v. People, 72 N. Y. 334, 63.

2. Phelps v. People, 72 N. Y. 334, 63.

Fifth. Saratoga Springs Reservation.

(Article X, Conservation Law.)

This article was added by Chapter 295 of the Laws of 1916.

It is made the duty of the Commission and it is given the power to select lands in the town of Saratoga Springs, Saratoga County, necessary for a State reservation and to preserve the natural mineral springs. Such lands may be acquired by agreement and conveyance or title may be secured by filing a map in the office of the Secretary of State and Saratoga county clerk's office. The fee may be taken or only a right, easement or interest, which shall become and be the property of the State of New York.³

3. See *Saratoga State Waters Corp. v. Pratt*, 227 N. Y. 429.

CHAPTER XV.

Historical Places.*

First. Generally.

By Chapter 166 of the Laws of 1895, as amended, trustees of scenic and historic places were created for the purpose of caring for certain property of the State, the corporate name being "The American Scenic and Historic Preservation Society," which was made capable of *purchasing* or *acquiring title* to places of scenic or historic interest.

By Chapter 116 of the Laws of 1896, authority was given to *accept a grant* of land known as the "John Brown Farm" in Essex County, same being the gift of Henry Clews and wife. The farm contains 243 acres and was occupied by the historic John Brown.

Chapter 279 of the Laws of 1897 authorized the Comptroller to *acquire title* to 50 acres of land in Warren County where the battle of Lake George was fought.

By Chapter 764 of the Laws of 1897 the Commissioners of the Land Office were authorized to *acquire*, in the name of the People of the State, 36 acres of land in Rockland County, known as the "Stony Creek Battlefield."

Chapter 653 of the Laws of 1904 provided for the *acquisition* by the Commissioners of the Land Office, in the name of the People, of the site of Fort Brewerton in Oswego County.

Chapter 681 of the Laws of 1906 authorized the Commissioners of the Land Office, in the name of the People of the State, to *acquire title* to about 18 acres of land in the city of Johnstown, Fulton County, known as the "Johnson Mansion and Blockhouse," formerly owned and occupied by Sir William Johnson.

Chapter 168 of the Laws of 1908 authorized the city of Yonkers to *convey* to the State, lands in that city known as the "Phillipse Manor House."

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, p. 3689.

Chapter 217 of the Laws of 1913 provided for the *acquisition* of *title* to lands in Herkimer County, known as the "Herkimer Farm" and owned and occupied by General Nicholas Herkimer in his lifetime.

In the same year, by Chapter 716, the Bennington Battlefield was authorized to be *acquired*. This land is located in Rensselaer county.

Chapter 496 of the Laws of 1915 authorized the American Scenic and Historic Preservation Society to *acquire title* to lands in Letchworth Park, title to vest in the State. Letchworth Park embraces 1,000 acres lying on both sides of the Genesee River in Wyoming and Livingston Counties. It was donated to the State in 1907.

Lands in the city of Amsterdam, Montgomery County, on which is located The Guy Park House, which was the home of Sir Guy Johnson in Revolutionary days, was *appropriated* in connection with the construction of the Barge Canal and *for Barge Canal purposes*. By Chapter 316 of the Laws of 1917, the Superintendent of Public Works was authorized to repair and restore the house and transfer the *custody* thereof to the Daughters of the American Revolution.

Other historical places *owned* by the State are:

Washington's Headquarters at Newburgh, *purchased* by the State in 1849.

Senate House at Kingston, *acquired* by the State in 1887.

Seneca Indian Council Rock in Monroe County.

Alexander Hamilton Mansion, known as Hamilton Grange, in New York City.

Spy Island in the Little Salmon River, Oswego County.

Battle Island in the Oswego River, Oswego County.

It is to be noted in particular that the method of acquiring title to the foregoing historical places is decidedly varied as well as the manner of care and maintenance. There is no uniform method of acquiring title to historical places or as to the supervision thereof, although trustees of scenic and historic places were created in 1895.

CHAPTER XVI.

State Lands — Generally.

- First. Palisades Interstate Park.
- Second. Other Parks.
- Third. State Institutions — Miscellaneous.

In addition to lands, the title to which has been acquired by the State for canal purposes, including all canal enlargements and reconstruction, lands acquired for highways, bridges, Forest Preserve, Adirondack and Catskill Parks and lands of historical interest, the State has acquired title to other lands by various methods and under general or special acts and from year to year continues to so acquire title to lands. This includes the following:

First. Palisades Interstate Park.*

This park was originally created in 1900 by the States of New York and New Jersey. The prime object was to preserve the scenery and create a place of recreation.

The Referendum Act of 1916 (Chapter 569) provided that \$2,500,000, or one-fourth of the \$10,000,000 to be realized from the sale of bonds, should be applicable to the acquisition of lands for the extension of the Palisades Interstate Park. The moneys were to be expended and the lands acquired by the Commissioners of the Palisades Interstate Park under Chapter 170 of the Laws of 1900. The title was to be acquired by contract or condemnation. The park is administered by commissioners appointed by the Governors of New York and New Jersey.

Second. Other Parks.

Other parks include the following:

Mohansic Lake Reservation, containing over 1,000 acres and located in Westchester County. This was originally

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 5, p. 5545.

acquired for hospital and training school purposes, but was converted into a park in 1918.

Fire Island State Park on the south shore of Long Island, containing about 100 acres.

John Boyd Thatcher Park of 350 acres, located in Albany County and *given* to the State in 1914.

Lester Park in Saratoga County *given* to the State in the same year.

Battle Island Park of 200 acres, in Oswego County, *given* to the State in 1916. It includes Battle Island.

Montcalm Park in the city of Oswego.

Watkins Glen of 100 acres in Schuyler County, *purchased* by the State in 1906. It has special geological interest.¹

Niagara Falls State Reservation, administered by five commissioners appointed by the Governor, includes about 400 acres of land and land under water. Title was *acquired* by condemnation proceedings for the purpose of preserving the natural scenery.²

Third. State Institutions — Miscellaneous.

In addition to the foregoing, the State owns the lands on which are located the following:

State Capitol,
State prisons,
State hospitals,
Asylums,
Custodial institutions,

and the many buildings used in connection therewith.

There are numerous other parcels of land owned by the State, among which are the following:

A parcel of 25 acres at Crown Point on Lake Champlain, *given* to the State in 1910.

Clark Reservation in Onondaga County, *given* to the State in 1915.

1. See Chapter 731, Laws of 1911.

2. See Sections 100-108, Public Lands Law.

Sixteen acres of land in Chemung County, known as the Newtown Battlefield.⁸

Squaw Island in Canandaigua Lake, Ontario County.

Stark's Knob, containing four acres and located in Saratoga County, *given* to the State in 1916.

Saratoga Battle Monument at Schuylerville, Saratoga County, *given* to the State in 1895.

Temple Hill near Newburgh, Orange County, *given* to the State in 1917.

The Clinton House at Poughkeepsie, occupied by George Clinton, the first Governor of the State.

The Schuyler Mansion in the city of Albany, which is administered by ten trustees appointed by the Governor.

There is no central office in which records may be found as to all land, title to which has been acquired by the State. Information may be found in the office of the State Comptroller and in particular as to the following:

Lands acquired:

- (a) For canal purposes,
- (b) Under tax deeds,
- (c) On foreclosure of Loan Commissioners' mortgages,
- (d) For State Park purposes.

There is on file in the office of the Comptroller a list compiled by him in 1907 of lands outside of the Forest Preserve, title to which was acquired by the State as a result of tax sales; also, a list compiled by the Conservation Commission in 1914, of lands inside the Forest Preserve, title to which was acquired by the State as a result of tax sales or pursuant to the Conservation Law.

The records in the Comptroller's office show that the State has title to about 100 parcels of land in the Forest Preserve counties, aggregating over 11,000 acres, and to about 150 parcels outside of Forest Preserve counties, aggregating about 8,500 acres, as a result of the foreclosure of Loan Commissioners' mortgages.

Section 26 of the State Finance Law requires the Comptroller

3. See Chapter 167, Laws of 1913.

to foreclose all mortgages belonging to the State, upon default, whenever it becomes necessary to protect the interest of the State. Such foreclosure proceedings shall be prosecuted by the Attorney General. The Comptroller is authorized to bid in the premises for and on behalf of the State, in case a sufficient amount is not bid therefor, as provided by Section 27 of the State Finance Law.

The records in the offices of the State Comptroller, State Engineer and Secretary of State, in particular, will disclose a large part of the State's ownership.

PART THREE.

How An Individual Acquires Title.

- Chap. XVII. Colonial Grants.
XVIII. State Legislative Grants.
XIX. Patents from Commissioners of Land Office.
XX. Lands Under Navigable Waters.
XXI. Abandoned Canal Lands.
XXII. Surplus Water and Water Power.
XXIII. Conveyance of Canal Lands.
XXIV. Condemnation.

CHAPTER XVII.

Colonial Grants.

Reference has been made under Chapter I, to the origin of the State Government April 20, 1777, and to the fact that all grants made by the King of Great Britain after October 14, 1775, are void. Prior to that time, all patents granted were known as Colonial patents or grants.

The first patent granted to Killian Van Rensselaer, of "Rensselaerwyck," bears date 1630 and was confirmed in 1685 and 1704. Gardners' Island was granted in 1639.

A list of subsequent patents may be found in the Historical and Statistical Gazetteer of New York State, published in 1860 and compiled by J. H. French.

A Calendar of New York Colonial Manuscripts, indorsed Land Papers, in the office of the Secretary of State, was published in 1864. This Calendar covers a period from 1643 to 1803 and serves as an index to sixty-three volumes of Land Papers in the office of the Secretary of State.

Many of the early Colonial patents are found in the New York State Library or in the office of the Secretary of State. It recently became necessary for the Attorney General to examine

title to an island in the Mohawk River near Schenectady, at one time known as Marten's Island and now known as Van Slyck's Island. There was no record of a patent having been issued, but after investigation an original patent was found in the office of the President of Union College. This patent was issued November 12, 1662, and written in the Dutch language. A translation was secured, which is now on file in the Division of Archives and History of the University of the State of New York.

Similar patents are recorded in Books of Patents in the New York State Library.

CHAPTER XVIII.

State Legislative Grants.

The first session of the State Senate and Assembly was held on the tenth day of September, 1777. The first act (Chapter I) was passed February 6, 1778.

Chapter 32, passed at the fourth session of the Legislature on March 20, 1781, provided for the granting of unappropriated lands to two regiments to be raised for the defence of the State. Land was to be granted in tracts of 500 acres, each designated a "right," the number of "rights" to be granted to one person being dependent upon the rank of the one to whom the "right" was to be granted. The act provided for a location and a survey to be made by the Surveyor General, which was to be filed in the office of the Secretary of State. The person performing military service for the required time was immediately, after the expiration of his time of service, entitled to the grant of the land so located.

The first grant made by the Legislature to an individual was made pursuant to Chapter 26 of the Laws of 1783, which provided as follows:

That John Cochran might locate 2,000 acres of land on certain conditions and that whenever he should certify such location to the Surveyor General of this State, if it appear to the Surveyor General that the 2,000 acres of land were properly located and described, the Surveyor General should approve such location and cause the same to be filed in the office of the Secretary of State and should, also, cause a survey of the lands so located to be made and returned, whereupon John Cochran should immediately be entitled to a grant of the lands.

In 1859, there was published a Catalogue of Maps and Surveys in the Offices of the Secretary of State, State Engineer and

Surveyor, Comptroller and New York State Library. This catalogue refers, among others, to Volume XL of Maps in the office of the Secretary of State and, in particular, to a map of 2,000 acres of land on the south side of the Mohawk River in the county of Montgomery surveyed for John Cochran by the Surveyor General. Thus, the foundation is laid for determining what lands were intended to be granted to John Cochran pursuant to Chapter 26 of the Laws of 1783.

This was followed by a patent to John Cochran recorded in the office of the Secretary of State in Book No. 17 of Patents, page 146.

Other State legislative grants may be found in the same way, by examining the proceedings of the Legislature from year to year.

In some instances the Legislature in and by an act granted specific lands or rights in lands, such as the right to build a dam across the Mohawk River. Such grants were not always followed by the issuance of letters patent, the act itself being effectual to convey the land or right in land.

Following the creation of the Commissioners of the Land Office, it was not the general practice of the Legislature to make grants direct or as was done in the John Cochran case. The Legislature gave to the Commissioners of the Land Office general authority to grant lands and specific authority to grant designated lands. To illustrate, see Chapter 26 of the Laws of 1793.

CHAPTER XIX.

Patents from Commissioners of the Land Office.

First. Generally.

Second. Unappropriated State Lands.

- A. Belonging to Common School Fund.
- B. Escheated Lands.
- C. Of Canal Fund.
- D. Purchased Under Mortgage Foreclosure.
- E. In Cities and Villages.
- F. Other Lands.

Third. Procedure.

- A. Form of Letters Patent.
 - 1. Preliminaries.
 - 2. Confirmatory Grants.
 - 3. Prohibited Grants.
- B. Failure of Title.
- C. Validity of Letters.
- D. Effect of Letters — Construction.

Fourth. Exceptions Under Second.

- A. Salt Spring Lands.
 - 1. History of.

Fifth. Complete Title in Individual.

- 1. Right of Property.
- 2. Right of Possession.
- 3. Possession.

First. Generally.

The Commissioners of the Land Office were created May 10, 1784, by Chapter 60 of that year. Chapter 67 of the Laws of 1786 repealed the Act of 1784 and provided a more definite procedure for the sale of unappropriated State lands. (See Chapter IV hereof.)

The rights of the Commissioners of the Land Office with regard to different types of land have changed from time to time with the various statutes and amendments thereof. At present they are fixed by the "Public Lands Law," being Chapter 50 of

the Laws of 1909, as amended. Under this act, Commissioners of the Land Office are vested with the power to dispose of:

1. Unappropriated State lands.
2. Lands under water.
3. Abandoned Canal lands.

Second. Unappropriated State Lands.*

Unappropriated State lands are by Section 30 of the Public Lands Law classified into six groups as follows:

A. STATE LANDS BELONGING TO THE COMMON SCHOOL FUND.

Lands belonging to the "common school fund" and owned by the State have generally been disposed of. The "common school fund" is defined by Section 80 of the State Finance Law.

These lands should not be confused with those set apart for local schools, the proceeds of which are referred to as the "school fund." (See Article XIX, Education Law.) This "school fund," and the early history of lands belonging to it, were discussed by J. H. French, at page 47 of his *Gazetteer of New York State*. (*Supra*, page 229.)

It frequently happens in the examination of title to lands that some were at one time set apart for school purposes, either as belonging to the "school fund" or to the "common school fund."

B. ESCHEATED LANDS.†

Sections 1977 to 1982, inclusive, of the Code of Civil Procedure provide for the bringing of actions by the Attorney General for the possession of real property escheated, *i. e.*, where title to lands has reverted to the State by reason of the failure of heirs or as the result of a conviction or outlawry for treason.

Article V of the Public Lands Law makes provision for a petition for release of escheated lands, as well as for a conveyance thereof.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6760.

† See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6770.

Weed's Practical Real Estate Law, p. 435.

CODE references. See Author's Note and Distribution Table—page xxiv

The Commissioners of the Land Office have adopted rules and regulations governing applications for the grant or conveyance of lands escheated to the State. A copy of such rules is contained in "Appendix XI."

Particular attention is called to the fact that by Section 69 of the Public Lands Law patents of real property escheated to the State, granted before May 16, 1892, have been ratified and confirmed unto the patentees, their heirs and assigns.

C. LANDS CONVEYED TO STATE FOR BENEFIT OF CANAL FUND.

Under the early Canal Acts (1816, 1817 and following), it was anticipated that lands would be granted or donated by citizens for the purpose of constructing the canals and in particular the lands over which the canals were to be constructed. A fund was created, which was known as the "canal fund," managed by the Commissioners thereof. It was assumed that grants of land would be made to the Commissioners of the Canal Fund and these expectations were in part realized. The Holland Land Company gave a large tract in Cattaraugus County. Other lands were given¹ or bought and credited to the "canal fund." Such lands conveyed to the State and not devoted to any public use may be granted by the Commissioners of the Land Office.²

Section 60 of the State Finance Law is to the effect that the "canal fund" shall consist of real property granted for the construction of the canals and remaining unsold. Section 61 provides that the care and disposition of all lands belonging to the "canal fund" shall be vested in the Commissioners of the Land Office.

D. LANDS PURCHASED BY STATE ON FORECLOSURE OF MORTGAGES.

United States funds, as well as funds of the State, have been loaned to individuals owning real property, who in turn have given mortgages known as Loan Commissioners' mortgages. These mortgages were entered in a book in the office of the county clerk of the county where the lands were located and signed by the

1. See reference to "Cessions" in Chapter IX, First, hereof.

2. See Article III, Public Lands Law.

mortgagor, the mortgagee being the "Commissioners for loaning certain moneys of the United States." These mortgages were not prepared on forms and a *record only* made in the clerk's office, but the original was written in the record book and the original signature and execution were made in the record book, so that the mortgage could not be assigned and delivered without tearing out the page, or satisfied without mutilating the original signature.

Many of these mortgages have been foreclosed under the provisions of Section 26 of the State Finance Law and title has become vested in the State, when not otherwise sold, under Section 27 of the same law.

These lands were and are subject to sale as provided by Article III of the Public Lands Law.

E. STATE LANDS WITHIN LIMITS OF CITY OR VILLAGE NOT DEVOTED TO PUBLIC USE.

The State has, from time to time, owned lands within the limits of a city or village, which lands have not been devoted to a public use. Under the definition of the "Forest Preserve" (Section 62, Conservation Law), the Forest Preserve shall include lands within the counties enumerated therein excepting lands within the limits of any city or village. Article III of the Public Lands Law makes provision for the sale and conveyance of same.

F. OTHER LANDS BELONGING TO THE STATE.

Under this heading would be included lands acquired by the State through tax sales. At one time it was the policy of the State to sell and convey such lands under the direction of the Commissioners of the Land Office. Such lands are still being sold unless they are located within the Forest Preserve. Since the State adopted the policy of acquiring lands within the Forest Preserve, and in particular within the Adirondack and Catskill Parks, as defined by Section 62 of the Conservation Law, it has not been the policy of the State to sell lands with these Parks.

The Commissioners of the Land Office have prescribed a form of notice of application for sale. See "Appendix XII."

A distinction is made between an applicant who claims to have been the owner of the land sold for taxes or a party interested in such lands and one who does not claim to be such owner or person in interest.

Third. Procedure.*

The first step taken by the Commissioners of the Land Office is to direct the State Engineer to make a survey of unappropriated State lands for the purpose of a sale thereof. A copy of the field book prepared by the surveyors appointed by the State Engineer to make the survey, is to be filed in the office of the Secretary of State.³

Section 32 of the Public Lands Law requires the State Engineer to make a map of each tract so surveyed and to deposit the same in his office and a copy thereof in the office of the Secretary of State.

Following the survey and filing of map, the Commissioners of the Land Office may direct the State Engineer to sell such lands at public auction, as provided by Section 33 of the Public Lands Law.

A purchaser at such a sale need not pay the full consideration and, if he does not so pay, he is not thereupon entitled to a deed. A percentage only may be paid and a bond given for the balance, in which event the State Engineer issues a certificate to the purchaser, which does not pass title to the purchaser or give the purchaser the right to cut or remove trees, unless the right to cut trees is expressly granted. The certificate may or may not, by its terms, entitle the holder thereof to immediate possession. If it does grant the right to possession, the holder thereof has a right to cut and use trees for specified purposes.⁴

These certificates of sale, issued by the State Engineer, are assignable and are frequently assigned. A person holding an original certificate with a written assignment thereof may be entitled to a patent. In some cases, a certificate is found in the possession of one other than the purchaser, without any written

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6760.

3. See Section 31, Public Lands Law.

4. See Section 34, Public Lands Law.

assignment thereof. In other cases, the purchaser has conveyed lands described in a certificate with or without a delivery of the certificate to his grantee or with or without an assignment of such certificate. Such a certificate was issued to one Sanborn in 1820. In 1902 one Elliott applied to the Commissioners of the Land Office for letters patent but did not present the certificate. The application was referred to the Attorney General. His opinion is reported at page 421, Report of Attorney General for 1902. The conclusion is reached that Elliott had supplied sufficient evidence that the interest of Sanborn in the certificate had been "assigned or conveyed" to himself.

The delivery of the certificate by the purchaser, together with a deed of the premises, without a formal written assignment of the certificate, would undoubtedly entitle the holder of the certificate and deed to a patent. A conveyance of the lands only without delivery and assignment of the certificate, before the issuance of letters patent, might be urged as an equitable assignment of the certificate. But assume that the holder of the certificate should deliver and assign same to one person and convey the lands described to another; the assignee holding the certificate rather than the grantee should be entitled to the patent.

It is even conceivable that one person may hold a deed from the purchaser, another an assignment of the certificate and still another the possession of the certificate. A question would then be presented to the Commissioners of the Land Office on the application of any one of the three for letters patent. No provision seems to have been made recognizing the right of one holding a conveyance only. The certificate or the assignment in case of a lost certificate is the basis for issuing letters patent. Notwithstanding, conveyances instead of assignments are not uncommon.

Section 35 of the Public Lands Law provides that if such certificate of the State Engineer be presented to the Commissioners of the Land Office, by the person to whom same was issued, or by his representatives or assigns, with proof of the payment of the whole purchase money, the bond given by the purchaser shall be cancelled by the Comptroller, and the Commissioners of the Land Office shall deliver letters patent for the land sold. Pro-

visions have also been made in case of a loss of the certificate or death of the purchaser before delivery of letters patent.

In case of nonpayment of the bond, the Comptroller may sue at the direction of the Commissioners of the Land Office, or they may direct the State Engineer to re-sell the land, all previous payments being forfeited. (Section 36, Public Lands Law.)⁵

Section 37 of the Public Lands Law provides for re-sale and Section 38 for payment on a re-sale.

The Commissioners of the Land Office determine as to whether or not a sale and grant of unappropriated lands shall be made, unless by special act of the Legislature provision is made for the grant by the Commissioners of a particular parcel of land. (See Section 40, Public Lands Law.)

A. FORM OF LETTERS PATENT.

Section 5 of the Public Lands Law authorizes the Commissioners of the Land Office to prescribe forms of letters patent, which shall contain an exception and reservation of all gold and silver mines. Conditions to be performed by the grantee may also be incorporated and a reasonable time fixed for the performance of such conditions. (Section 14, Public Lands Law.)

1. *Preliminaries.*

The Commissioners before granting any lands may inquire into the rights of the person applying for a grant, and may by regulation prescribe the proof to be submitted by the applicant. (Section 10, Public Lands Law.)

2. *Confirmatory Grants.*

Defective grants may be cured by the issuance of a confirmatory grant. (Section 11, Public Lands Law.)

3. *Prohibited Grants.*

Section 15 prohibits a grant or lease of the islands in Lake George, and Section 16 has a like effect as to Esopus Island in Dutchess County, which is dedicated as a public park.

5. See *Candee v. Haywood*, 37 N. Y. 653.

Allen v. Commissioners of Land Office, 38 N. Y. 312.

Article VII, Sections 7 and 8, respectively, of the State Constitution prohibit the grant of Forest Preserve lands and canal lands not abandoned.

B. FAILURE OF TITLE.*

Section 6 of the Public Lands Law is to the effect that whenever the title of the State to lands *granted* by the Commissioners of the Land Office fails, and a "legal claim" for compensation on account of such failure is presented by one entitled thereto, the original purchase money shall be refunded.

The history and legal effect of this section, which was formerly Section 5 (Laws of 1894), was considered at length by the Attorney General in an opinion rendered in 1900 (page 288). Chapter 69 of the Laws of 1801 and Chapter 72 of the same year were referred to. The former act gave to the Commissioners of the Land Office power to issue letters patent in such form as they might direct, while the latter act provided that conveyances should be deemed to operate as a warranty from the people, unless the Surveyor General should deem the State to have an incomplete title, when the conveyance was not to operate as a warranty of title.

The Revised Statutes of 1827 (Part 1, Chap. 9, Title 5, Art. I, § 6) were substantially like the present Section 6 of the Public Lands Law, and made provision for refund on failure of title.

Following the passage of the Revised Statutes, it appears to have been the practice of the Commissioners to issue quit-claim patents at the sole risk of the purchaser as to the validity of the title granted.

In the year following the opinion of the Attorney General (1901), the court in *People v. Woodruff*⁶ held that a purchaser from the State under an instrument which only quit-claimed any right, title or interest which the State had, was not entitled to a refund of purchase money. This seems to be the law to-day in the absence of special legislation, or excepting a case where the patentee fails to secure a title by reason of an error committed by the State officer who executed the conveyance.⁷

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6753.

6. 57 A. D. 342; 68 N. Y. Supp. 100.

7. *Wheeler v. State*, 190 N. Y. 406.

In the Wheeler case,⁸ the patent under consideration contained a provision that it should in no wise operate as a warranty of title. The lands granted by the State had been conveyed to it by the Comptroller following a tax sale, which was void. The patentee was ejected from a portion of the lands granted as a result of suits brought by former owners. The Legislature then conferred upon the Court of Claims power to hear a claim of the patentee. The Attorney General urged that the act was unconstitutional. The Court of Appeals held "that the Legislature had power to legalize and validate a claim supported by moral obligation and founded in justice." It was pointed out that the failure of title was due to the misconduct or error of a State officer. Reference was also made to the provision in the Public Lands Law for a refund, and it was held that the claimant was entitled to the benefit of this statutory provision, unless the former conveyance is such as to show a clear intention to exclude him from any right thereunder. The patent under consideration was held to be not a mere quit-claim, but a grant of the premises, the lands being sold and not merely the right, title and interest of the State therein.

The Court of Appeals in the Wheeler opinion stated that the court in the Woodruff case "properly held that the failure of title created no liability on the part of the State to refund," but distinguished the two forms of letters patent under consideration, the one in the Woodruff case being a mere quit-claim of the "right, title and interest" of the State, while the one in the Wheeler case being a grant of the premises, *i. e.*, the land described.

Although the Public Lands Law provides for a refund in the case of a failure of title to lands "granted," it may develop after a sale by the State Engineer, and before letters patent are issued, that the State has no title to grant. Such a situation arose and was presented to the Commissioners of the Land Office. A refund was demanded and denied. A writ of mandamus was issued against the Commissioners of the Land Office. It was held in *People v. Commissioners* (149 N. Y. 26) that the Commissioners were called upon to determine three questions:

8. 190 N. Y. 406.

1. Had the title of the People failed?
2. Did a legal claim for compensation exist?
3. Was the claimant entitled to compensation?

It was further held that the Commissioners in determining these questions act judicially as distinguished from the performance of a ministerial duty.

C. VALIDITY OF LETTERS PATENT.

The validity of letters patent and the effectiveness of same to convey title depends on the proper execution and record in the office of the Secretary of State. It has generally been the law that public grants to be valid must be recorded. The record is not for the purpose of notice under recording acts but to make the transfer effectual. This subject was considered at length in Chapter XIII, Fifth, F.—“Patents — Where Recorded.”

D. EFFECT OF LETTERS — CONSTRUCTION.

“The principle, however, is fundamental that ‘every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public.’”⁹

A Colonial patent to certain named individuals for and on behalf of themselves and the freeholders and inhabitants of a specified town vested no title in the patentees individually or as tenants in common, but the title became vested in the town as a corporation. The town took title subject to the public right of navigation and commerce. The purely political jurisdiction may at any time be resumed. The town held the lands for public purposes and was to administer them for the public good. They could not be used so as to interfere with the rights of the public and no substantial use could be made of them.¹⁰

9. *Holmes E. P. Co. v. Williams*, 228 N. Y. 407, 47.

10. *People ex rel. Palmer v. Travis*, 223 N. Y. 150, 62.

See also *Matter of City of N. Y.*, 161 A. D. 530; 146 N. Y. Supp. 600; *af. 212 N. Y. 325*.

Smith v. Odell, 194 A. D. 763.

Fourth. Exceptions Under "Second."

The term "unappropriated State lands" does not include:

1. Lands under water.
2. Abandoned canal lands.
3. Salt Springs lands.

Grants of lands under navigable waters are considered under "Chapter XX" and abandoned canal lands under "Chapter XXI."

A. SALT SPRINGS LANDS.*

The State is the owner of lands in Onondaga County containing salt springs or used for the manufacture of salt.¹¹

Section 37 of the Salt Springs Law is to the effect that the title to all lands of the Onondaga Salt Springs Reservation which are now adjacent to or which surround or upon which are located the engines, pumps or wells belonging to the People of the State of New York, and the title to all other lands of the Onondaga Salt Springs Reservation, which shall not have been sold or disposed of as therein provided, "shall vest and be in the People of the State."

Section 36 provides that the Commissioners of the Land Office shall cause to be appraised and sold and shall convey in fee any of the lands of the Onondaga Salt Springs Reservation, upon the request of any of the lessees of said lands, on certain specific conditions. On failure of the lessee to purchase at the appraised value, such lands shall be advertised and sold under the direction of the Commissioners of the Land Office to the highest bidder in accordance with the provisions of the Public Lands Law.

1. *History of Salt Springs Lands.*

By the Fort Stanwix Treaty with the Onondaga Indians in 1788, the Indians ceded all their lands in the State of New York to the People forever, and the State set off to the Indians certain lands near Onondaga Lake, to be held by them and their poster-

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 7, p. 7677.

11. See Salt Springs Law, Chap. 54, Laws of 1909.

ity forever, but not to be sold. It was further provided that the Salt Lake, now Onondaga Lake, and the lands for one mile around the same, should remain forever for the common benefit of the State and the Onondagas and their posterity for the purposes of making salt, and that said lands should not be granted or otherwise disposed of for other purposes.

This seems to be the first provision in the laws making this a reservation.

By the Treaty of 1793 with the Onondagas, the Indians released part of the reserved lands adjoining and south of the one-mile reservation.

By the Treaty of 1795 with the Onondagas, they relinquished to the State all their rights in the salt reservation one mile around the Salt Lake.

There have been a great many acts of the Legislature relative to this Salt Springs Reservation and the disposal of the lands thereof, among which are the following:

Chapter 102 of the Laws of 1807 directed the Superintendent of the Salt Springs to survey the land into lots and lease same for salt manufacture.

Chapter 161 of the Laws of 1810 directed the Surveyor General to divide part of the reservation into lots and sell the same.

Chapter 164 of the Laws of 1812 authorized the Superintendent of the Salt Springs to sell certain lots.

Chapter 117 of the Laws of 1820 (§ 3) directed the Commissioners of the Land Office to cause to be surveyed into lots the lands of the People in the Salt Springs tract, Onondaga County * * * and to sell the same in the manner that unappropriated lands of the State are directed to be sold, in such part and at such times as they shall judge best for the interest of the State; reserving to the people in all such sales all salt springs and mines — coal mines and other mines and minerals — with the right to enter and use such parts as may be necessary to dig or work such mines and springs.

Chapter 231 of the Laws of 1821 (§ 6) defined the Salt Spring Reservation to be all that territory originally set apart and reserved for the use of the salt springs in Onondaga County.

Chapter 177 of the Laws of 1822 authorized the Land Office

to set apart certain lots for the manufacture of salt to corporations or individuals.

The first Constitution of the State contained no provision relative to the Salt Springs Reservation.

The Constitution of 1821 (Art. 7, § 10) provided that "the Legislature shall never sell or dispose of the salt springs belonging to this State, nor the lands contiguous thereto, which may be necessary or convenient for their use * * * but the same shall be and remain the property of this State."

Section 13 declared all laws repugnant to this Constitution abrogated.

The Constitution of 1846 provided by Article 7, Section 7: "The Legislature shall never sell or dispose of the salt springs belonging to the State. The lands contiguous thereto which may be necessary or convenient for the use of the salt springs, may be sold by authority of law and under the direction of the Commissioners of the Land Office, for the purpose of investing the moneys arising therefrom in other lands alike convenient; but by such sale and purchase, the aggregate quantity of these lands shall not be diminished."

The Constitution of 1875 (Art. 7, § 7) contained the same provision.

The Constitution of 1894 omitted these provisions, prohibiting the sale of lands in the Salt Springs Reservation.

The Laws of 1827 in Chapter 9 (Title 10, Art. 1) of Revised Statutes, prohibited the sale of the salt springs and contiguous lands as in the Constitution of 1821, and the Revised Statutes of 1846 contained the same provision.

The fourth edition of Revised Statutes (1875) (Part 1, Title 5, Art. 7, §§ 108 to 110) provided for the sale by the Commissioners of the Land Office of lands in Onondaga Salt Springs Reservation not occupied for salt manufacture.

See also Laws of 1848, Chapter 346, and Laws of 1859, Chapter 346. This last was an enactment of the provisions of the Constitution of 1846 as to sale of the salt springs land, and contained provisions for the method of sale.

Chapter 200 of the Laws of 1874 provided for the sale by the Commissioners of the Land Office of certain fine salt lots.

The "Salt Springs Law," Chapter 684 of the Laws of 1892, defined the Onondaga Reservation as including all the lands in Onondaga County containing salt springs or owned by the People and adjacent thereto, or connected therewith, or set apart for such purposes by the Commissioners of the Land Office.

Section 43 of said law authorized the sale of certain salt lots not necessary for the manufacture of salt, and the sale of which would not be injurious to the State.

Section 45 provided for the sale of coarse salt lots and the purchase of other lots for the benefit of the State.

The Salt Spring Law of 1897, Chapter 261, and of 1898, Chapter 27, authorized the Commissioners of the Land Office to sell and convey lands in the reservation.

There are very few cases in the reports concerning these salt springs or the laws relating thereto, but in *Parmelee v. Oswego & Syracuse R. R.* (7 Barbour, 599) and 6 N. Y. 74, and in *Newcomb v. Newcomb* (12 N. Y. 603), it is stated by the court that any sale or patent of these lands by the State while the constitutional inhibition was in force, would be void.

Fifth. Complete Title in Individual.*

Whether a grant is made directly by the Legislature or under letters patent issued by the Commissioners of the Land Office on authority of the Legislature, the patentee, in order to secure a complete title, should take possession of the lands granted, assuming that the lands are of such a character as to entitle him to exclusive possession and that the public has no rights in and to same.

A "complete title" has been defined by Blackstone and is referred to in *Dingey v. Paxton* (60 Miss. 1038, 54). A "complete title" consists of:

1. Right of property,
2. Right of possession, and
3. Possession.

*See also *Weed's Practical Real Estate Law*, p. 1131.

Right of property and right of possession may be granted by the Legislature or Commissioners of the Land Office. These two rights give *constructive* possession. It rests with the person to whom a grant is made as to whether he will take *actual* possession and thus secure to himself a complete title which might otherwise be lost through the adverse user and possession of another.

CHAPTER XX.

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Lands Under Navigable Waters.*

Article VI of the Public Lands Law authorizes grants of land under water, in particular, lands under:

1. Navigable rivers and lakes,
2. Hudson River adjacent to State of New Jersey,
3. Waters surrounding Great Barn Island in City of New York,
4. Waters surrounding Staten Island,
5. Waters surrounding Long Island,
6. East River or Long Island Sound, bordering Westchester County,

with certain limitations.

The Commissioners of the Land Office may grant to the owners of the lands adjacent to such lands under water, so much of said lands under water as the Commissioners deem necessary:

- (a) To promote the commerce of this State, or
- (b) For the purpose of beneficial enjoyment, or
- (c) For agricultural purposes.

Before considering the method of granting lands under water under the existing statutes, the rights of the State thereto and the common-law rights of the upland owner and the public will be briefly considered, as well as the history and early practice of granting lands under water.

First. Common-Law Rights of Upland Owners.

Under the common law, the upland owner has the right to build a dock, consisting of a landing, wharf or pier, upon lands under navigable waters although owned by the State or another, in front of his upland, for the purpose of connecting his upland with the navigable part of the waters lying in front thereof. The upland owner has this common-law right without any grant from the Legislature or from the Commissioners of the Land Office. If

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6775.
Weed's Practical Real Estate Law, p. 1222.

the upland owner has a manufacturing plant upon his upland and wishes to ship the products therefrom upon the waters lying in front thereof, and if such waters are too shallow to permit the bringing of boats to the upland, the upland owner can build a dock or pier for the purpose of connecting his upland and factory with the navigable part of the water lying in front thereof.

The upland owner also has the right under the common law, and this right has frequently been exercised, to permit the public to pass over his upland to such dock or pier and to dock boats at such dock or pier; he can permit the public to load and unload boats at his dock or pier and pass over same and his upland, and he can also permit the public to transport merchandise to such boats from his dock, pier and upland, and from such boats over his dock, pier and upland.

The common-law rights of an upland owner are quite fully set forth in *Thousand Islands Steamboat Co. v. Visger* (179 N. Y. 206). The right of access to the navigable part of waters and to make a landing, wharf or pier for the individual use of the upland owner or for the use of the public is recognized, subject to such rules and regulations as may be imposed —

- (a) By the Legislature for the protection of the rights of the public, or
- (b) By Congress.

As to what constitutes the navigable part of such waters is a question of fact peculiar to each stream or body of water and each and every parcel of land bordering on same, having in mind the character of navigation in which the individual or public is engaged.

No one, other than the State or Congress acting in the interest of the public, can prevent the proper exercise of this common-law right.

The State may act in the interest of the public by improving navigation or protecting the public's right to fish and boat in the waters adjoining the upland.¹

1. *Smith v. Odell*, 194 A. D. 763.

A. WHAT SUBJECT TO.

There exist four principal rights, some of which may be exercised at the same time that the common-law right of the upland owner and others is being exercised in derogation thereof:

1. The common-law right of the upland owner referred to;
2. The common-law right of the public to fish and boat, as well as navigate and transport commerce;
3. The right of the State to improve navigation, such as dredging; or of a delegatee of the State, to wit: a municipality, to improve navigation and aid commerce;
4. The right of Congress to likewise improve navigation and to regulate same.²

Questions as to these rights frequently arise. Reference is made to the principles laid down in the following cases:

The right of access of the upland owner to the deep or open waters is limited to those waters in "front" of his upland. The rules applicable to the division of rights and the location of lines between riparian owners are considered at length in *Dooley v. P. & G. M. Co.*³

An opinion of Judge Haight, formerly of the Court of Appeals, as referee in *Border Island Co. v. Cowles Shipyard Co.*, reported in 94 Misc. at page 340, is of great importance as affecting the title to the Niagara River and islands therein. The rights of an upland owner are set forth at length, including the rights of accretion, fishing, boating, navigation and transportation of commerce, subject to specific requirements. The distinction between common-law rights and rights granted by the Legislature or Commissioners of the Land Office are pointed out, as well as rights resulting from accretion or lost by reason of erosion. The location of lines dividing rights between riparian owners was also involved and rules governing same were stated.

In *People v. Mould*⁴ it was held that an upland owner has

2. *Smith v. Odell*, 194 A. D. 763.

3. 77 Misc. 398; 137 N. Y. Supp. 737.

4. 37 A. D. 35; 55 N. Y. Supp. 453.

the right to build and maintain a wharf in front of his uplands for the purpose of reaching the navigable part of the stream and that if such wharf is not a nuisance or an obstruction to navigation, and does not interfere with any public right or use, the State could not remove same or cause its removal unless the State should be engaged in improving navigation. The State sought to remove a wharf erected in the Hudson River and the opinion of Judge Putnam elaborately reviewed the common-law rights of riparian owners and many of the decisions relative thereto. It was held that the owner might maintain the wharf erected by him, as it was not an obstruction to navigation and did not interfere with any right of fishing or any other public use.

The right of the public to use the foreshore for fishing, bathing, boating and passage, as well as the right to make same more available, was considered in *Tiffany v. Town of Oyster Bay*,⁵ and it was held that the shore owner was not entitled to have his upland remain in actual contact with the water for its entire length; that the use by the public for the purposes enumerated was not inconsistent with the exercise of the common-law rights of an upland owner. This decision was reversed, however, by the Appellate Division.⁶

A public street may be maintained along the water front and the upland owner may use same as a means of access to the navigable part of the waters lying in front thereof; the two uses are not inconsistent.⁷

The common-law rights of an upland owner to maintain piers and the duty to keep the slip between them dredged out so as to permit the ordinary use thereof for commerce, although the title to lands beneath the waters is in the State, are set forth in *Matter of McClellan*.⁸

5. 104 Misc. 445; 172 N. Y. Supp. 356.

6. 192 A. D. 126; 192 N. Y. Supp. 738.

7. *City of Buffalo v. D., L. & W. R. R. Co.*, 190 N. Y. 84.

See also *Moenig v. N. Y. C. R. R. Co.*, 187 A. D. 323; 175 N. Y. Supp. 665.

8. 146 A. D. 594; 131 N. Y. Supp. 633; *af.* 204 N. Y. 677.

The rights under consideration were exhaustively reviewed in two opinions in *Town of Brookhaven v. Smith* (188 N. Y. 74). Three judges of the Court of Appeals concurred in one opinion and two in the other. The common-law rules were held to depend upon the extent to which they are reasonable and in accord with public policy and sentiment, and where riparian owners have made their easement or right of access practical and available by constructing docks, piers or wharves, and have done so without interference by the State, if superior public rights have not been obstructed, they should not be held to be unlawful encroachments. The town of Brookhaven owned the fee to the lands under water, upon which a pier was erected by the upland owner. The town acquired title to the lands subject to the public rights of navigation and to the rights of access of riparian owners. The common-law rule of England, which would have forbade the upland owner from maintaining a pier, was departed from. The right of the upland owner "of access to the channel or navigable part of the river for navigation, fishing and such other uses as commonly belong to riparian ownership" and "the right to make a landing, wharf or pier for his own use or for that of the public, with the right of passage to and from same with reasonable safety and convenience," was reasserted. (page 82.)

This case was distinguished in *Matter of City of New York* (216 N. Y. 67, 77) which involved a grant to an individual instead of a town. Held, that the fee ownership had value; that the land, although at the end of a street, might be used for "other purposes."

The relative common-law rights of an upland owner, who is referred to as a "littoral" owner, and the public are well set forth by Judge Werner in *Barnes v. M. R. R. T. Co.* (193 N. Y. 378). The opinion is to the effect that it would be impossible for the littoral owner to construct a pier or other structure of substantial character extending from the upland to the land under water without obstructing to some degree the right of passage which the public has along the foreshore. The littoral owner was held to have the following right:

“To construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended, and that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the foreshore, the former was paramount and the latter was subordinate; and the logical corollary to that proposition is that just in so far as the attempted exercise of the littoral or riparian right passed the prescribed bounds of necessity and reason, the conditions were reversed and the right of passage along the foreshore remained the paramount right. That is so because the littoral or riparian owner, in his capacity as such, acquires only those rights in the foreshore which are necessary to enable him to make a reasonable use of his upland; and the principal attribute of such use is access to and egress from the open water. The defendant, therefore, had the right to erect and maintain a pier for the purpose of connecting its upland with the sea. Just so far as it was a necessary consequence of the reasonable exercise of that right to obstruct the foreshore and thus to limit the free and convenient passage of the public, the defendant's rights are superior to all others save those reserved to Congress and the State Legislature. To the extent that the defendant transcended these bounds, the rights of the public remain unaffected.”

The common-law rights of the upland owner and the public were more specifically set forth on a second appeal to the Court of Appeals, the opinion being reported in 218 N. Y., at page 91. Judge Cardozo, writing the opinion which was unanimously concurred in, stated that the passage under the pier must be free and substantially unobstructed from high to low water mark and over the entire width of the foreshore so that the public will have no difficulty in walking under the pier when the tide is low, or in going under it in boats when the tide is high. In the absence of such a passage, the right of passage to the public should be afforded over the pier. Even though there may be a passage underneath the pier to-day, changed conditions in the beach may render a

passage impossible from time to time. During such period, the public would have a right to pass over the pier.

It was also held, if a highway had been maintained along the foreshore, that if the whole or a portion thereof should remain closed with the acquiescence of the public for a period of six years, the public right to use such highway so remaining closed would be extinguished.

The relative rights of an upland owner and one of the public were involved in *Johnson v. May*.⁹ It was held that one of the public could use lands between high and low water mark for passing and repassing but may not have the right to erect a tent on the beach between high and low water mark.

In an earlier decision (1897) relative to lands along the Harlem River in the City of New York, in an opinion by Judge Vann in *Sage v. The Mayor* (154 N. Y. 61), where the upland owner owned to the high water mark, the conclusion was reached that the common-law riparian rights of the upland owner were subordinate to the rights of the City of New York. The City of New York filled in the water front and constructed a sea-wall between the high and low water mark. Such construction was held to be the property of the city for the benefit of the public; the city had the right to fill in and make the improvements and build an exterior street, docks and bulkheads essential to navigation and commerce, without making compensation. The various decisions affecting the individual rights of the riparian owner were analyzed and discussed. The right of the State or the City of New York, by permission of the State, to abridge or destroy the common-law rights of the upland owner, in the improvement of navigation, without making compensation, was recognized. *Langdon v. Mayor* (93 N. Y. 129), which held that the City of New York could not take a private wharf or easement without making compensation, was distinguished on the ground that such wharves were erected pursuant to grants from the State of lands under water.

A distinction between an embankment or structure along the

9. 189 A. D. 196; 178 N. Y. Supp. 742.

water front built by a railroad company, even under legislative authority, which would *deprive* the upland owner of access to the navigable part of the stream, and the building of an embankment or dock by the State in the improvement of navigation, was referred to. In the first case, the upland owner could recover damages from the railroad company.

The upland owner under his common-law right may have both:

- (a) The common-law right to build a pier to navigable waters, and
- (b) A pier constructed by virtue of such right.

Both the right and the pier are property. If the State, or a city to which it delegates authority, does not take away that right but replaces the pier with a new dock or pier for the use of the public, including the upland owner, such upland owner may not suffer any loss or inconvenience excepting that he could not use the State or city pier exclusively as he had the right to use his own, but must use same in common with the public as one of the public. If his private pier is destroyed, he may have no remedy. This would depend upon whether he was given an opportunity to remove it. If given such opportunity by notice, he would undoubtedly be obliged to remove the pier and would not be entitled to compensation for so doing or for the value of the pier. If he failed to remove the pier on notice so to do, he could not recover its value in case of destruction after notice. But in the absence of notice and an opportunity to remove such pier, he might recover its value if destroyed.

One who has erected and maintained structures on canal lands of the State has been held to be entitled to notice to remove same before destruction thereof and on failure of notice to be entitled to compensation in case of destruction. So held, although no right existed, and although no permission was given to erect the structure in the first instance; a license will be assumed.¹⁰

10. *Watson v. E. E. Co.*, 77 Misc. 543; 137 N. Y. Supp. 231.

One who erects a pier under his common-law right would be entitled to as much protection against its destruction as one who erects structures on canal lands by no right or authority.

Although the riparian owner may lawfully construct piers and docks to an established line, in doing so he takes the risk of a change in such line by the Secretary of War under authority of Congress, if required for the improvement of navigation. If the United States Government should change the harbor line and move same inshore and remove structures extending beyond the new line, the owner of such structures would not be entitled to compensation.¹¹

In addition to the easement or right of passage to and fro between the upland and navigable part of the stream, for the transportation of merchandise, the upland owner has the right to fish and draw nets, to land boats and to load and unload same. The stream is to him a public highway and these privileges are his absolute property rights as against all but the State. The People of the State, or its successor, the City of New York, may hold the fee in trust and, in the execution of its trust, the rights of the upland owner may be destroyed or impaired if demanded by public necessity in the promotion of commerce and navigation, but if the city should destroy or impair such easements for other purposes, it would be liable to the owner of the common-law rights.¹²

An upland owner may in order to exercise his common-law right of access interfere with another common-law right which is recognized, viz., the right to plant oyster beds and protect them against trespassers.¹³

An owner of upland maintained a springboard extending over public waters. It was held in *Hynes v. N. Y. C. R. R. Co.*,¹⁴

11. *Garrison v. G. J. L. Co.*, 215 Fed. Rep. 576; *af.* 237 U. S. 251.

See also *Slingerland v. I. C. Co.*, 169 N. Y. 60, 63.

12. *Burns Bros. v. City of N. Y.*, 173 A. D. 615; 165 N. Y. Supp. 615; citing *Matter of City of N. Y.*, 168 N. Y. 134.

13. *Post v. Kreischer*, 103 N. Y. 110.

14. 188 A. D. 178; 176 N. Y. Supp. 795.

that the upland owner was the owner of the plank or springboard and that he had the right to maintain and use same as against all private intruders or trespassers.

An opinion by the Attorney General in his report for the year 1918 (page 294) defines a pier as "a structure extending from solid land out into the waters of the river, lake or harbor to afford convenient passage for persons and property to and from vessels along the sides of the pier." A wharf is described as "a structure extending some distance into the water for the convenience of lading and unlading ships and other vessels." "The fundamental idea of a pier or wharf is that of a broad plain place near a river or other water to lay wares on that are brought to or from the water. It is simply a convenient loading and unloading place." The common-law rights of the upland owner to maintain a pier or wharf are considered. Attention is called to the fact that the owner has no right under the common law to build a structure such as an icehouse upon a pier or wharf erected under his common-law right.

The Supreme Court of the United States has also spoken on the subject of riparian rights in *I. C. R. R. Co. v. Illinois* (146 U. S. 387, at pages 445 and 446). The rights of the owner of land "in contact" with navigable waters are succinctly stated. Proximity of ownership is insufficient. There must be actual contact. The opinion is in harmony with the New York decisions above referred to.

Public common-law rights with respect to the sea, in England, are referred to in *People v. S. P. Co.* (218 N. Y. 459, at page 474) as follows:

"The right of the public to use the foreshore in England is very restricted." * * * "It was held not to include the right of bathing." * * * "The public common-law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore, when covered with water; and though, as incident thereto, the public must have

the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing or embarking where they please upon the sea shore, or the land adjoining thereto, except in case of peril or necessity."

"The case last cited was one to recover for trespasses against a person who wheeled bathing boxes over land above high-water mark down to the seashore and over the foreshore, which was leased to the plaintiff, and it was held in that case that the lessee of the foreshore had a right to treat every bather, every nurse-maid with a perambulator, every boy riding a donkey, and every preacher as a trespasser."

The right of the public to use the foreshore in this country is stated to be much more liberal. (Page 475.)¹⁵

The common-law rights of an upland owner may be summarized as follows:

1. To stand on his upland and fish in the navigable waters in front thereof and to draw nets.
2. To bath in such waters.
3. To embark from the shore in a rowboat or boat of such size as may be used and to land such boat and pass therefrom to the upland.
4. To transport merchandise in the same way.
5. To build piers for the purpose of reaching the navigable part of the waters, such piers to be maintained without unduly transcending the rights of the public; also to build wharves or docks.
6. To transport merchandise to and from such pier, wharf or dock and over such waters.
7. To permit the public to do the same and to make a charge therefor.

15. See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 38, p. 509.

8. To dredge and maintain a slip between piers in the event it is necessary and reasonable to maintain two or more piers in front of a particular piece of upland.

B. EFFECT OF INTERFERENCE WITH.

The effect of an interference with the common-law rights of an upland owner has been considered by the courts. It was held in *Rumsey v. N. Y. & N. E. R. R. Co.* (133 N. Y. 79) that an owner of lands bounding a navigable river has property rights consisting of a right of access to the navigable part of the river and the right to construct a landing, wharf or pier. This riparian right is property and is valuable and cannot be arbitrarily or capriciously destroyed or impaired; it can only be taken upon due compensation. It cannot be impaired as a result of a grant under legislative authority to another, such as a railroad company to build a railroad along the shore. "This principle cannot, of course, be extended so as to interfere with the right of the State to improve the navigation of the river or with the power of Congress to regulate commerce under the provisions of the Federal Constitution."

The decision in the *Rumsey* case, in 1892, in so far as it created a liability on the part of the railroad company, reversed the law as it had existed since 1852.

It was referred to in *First Construction Company v. State* (221 N. Y. 295, at page 316), where it was held that under principles of common law, the riparian owner has certain rights in and over the foreshore of which he cannot be deprived without compensation. This conclusion may raise the question as to whether the court considered that the State might be liable for destroying or impairing a common-law right of access, as a result of improving the navigation of the river or the construction of a public dock. The distinction between the *right* and a *structure*, already pointed out, should be kept in mind.

In *Sage v. The Mayor* (154 N. Y. 61) the rule laid down in the *Rumsey* case was followed. The common-law riparian rights of an upland owner were held to be property of which the upland owner could not be deprived without due process of law, although he could only use them subject to the rights of the public. "While

the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, when the interest of the whole people requires an improvement of a waterfront for the benefit of navigation and commerce, it seems to have been the rule for the State, * * * to make such improvements upon the tide waterfront for that purpose, without compensating the riparian proprietor, other than by giving him the pre-emptive right of purchasing in case of a sale."

The rules laid down in the Sage case were reiterated in *Matter of City of New York* (168 N. Y. 134).

It thus appears that the upland owner has a common-law right of access to the navigable part of navigable waters adjacent to his uplands, which cannot be destroyed or impaired, excepting in the interest of commerce and navigation for the benefit of all the people. Such improvement for the benefit of the people can be made without compensation. The individual right must give way to the rights of all, but cannot be destroyed or impaired by one or by less than all the people, even by legislative authority, without compensation.

Second. Common-Law Rights of Public.

The public has certain common-law rights which may be exercised in common with those of the upland owner and which may be summarized as follows:

1. To fish in navigable waters in front of uplands.
2. To bathe in such waters.
3. To navigate said waters and transport merchandise thereon.
4. To land at a pier or dock maintained under a common-law right with the consent of the owner thereof.
5. To land on the upland but not without the consent of the owner thereof, except in case of peril or necessity.
6. Not to be obstructed in using the foreshore by reason of an unreasonable structure or pier erected by the upland owner.
7. To plant oysters and harvest same.

The common-law right as well as the statutory right of one who plants oysters on lands under water granted to an

individual, to maintain an oyster bed as against such individual, is stated in *Post v. Kreischer* (103 N. Y. 110):

"The planting of oysters in tide waters, and the right of property in the person planting them, is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the State, but as a legitimate exercise of the common-law right, not inconsistent with its reasonable enjoyment by others."¹⁶

8. The public may, in the event a highway is laid out along the waterfront on lands formerly under water, use same as a public highway in common with the upland owner.

Third. Rules and Regulations.

The foregoing common-law rights are subject to rules and regulations which may be imposed by the Legislature or Congress.

A. BY CONGRESS.*

Congress has the supreme authority and jurisdiction over lands under navigable waters and may determine a line beyond which no solid fill shall be made, known as a bulkhead line, defined in *Matter of City of New York* (217 N. Y. 1, 17).

A pier or pierhead line may also be established which may coincide with the bulkhead line or be located without on the water side of the bulkhead line. When the pierhead line is without the bulkhead line, only piers may be erected between the two, and in no event can a pier be erected beyond a pierhead line.

No attempt will be made to review the statutes under which the United States exercises its paramount authority, or the decisions relative to same. Reference is made, however, to *Garrison, Secretary of War, et al. v. Greenleaf Johnson Lumber Co.* (215 Fed. Rep. 576; *af. 237 U. S. 251*), which is authority for the conclusion that "all State laws and regulations with respect to navigable waters, and all rights acquired under them, are subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation,"

16. See also *Smith v. Odell*, 194 A. D. 763.

* See also *Weed's Practical Real Estate Law*, p. 1227; p. 1230.

and that "a harbor line established by the Secretary of War under authority conferred by Congress is subject to change by the same authority." It appears that harbor commissioners, under authority conferred by the laws of Virginia, established a harbor line in 1876; that in 1890, this harbor line was adopted by the Secretary of War on behalf of the United States, under authority conferred by an act of Congress, as the National Government's limit of navigable water. Thereafter, and in 1911, the Secretary of War, under the authority of an act of Congress, established a new navigation or harbor line. The harbor line was established by the Secretary of War under the Statute of 1888 (Chapter 860, 25 Stat. 425). Section 12 thereof reads as follows:

"Sec. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him."

A later act, providing for the establishment of harbor lines, is Chapter 425 of 1899 (30 Stat. 1151).

It was held that "under the Constitution of the United States, the control and development of all navigable streams remains in the Federal Government, and that no rights can be acquired against it except under affirmative conferment of Congress; that the harbor lines of the Federal Government designating the limit of navigation are changeable at its discretion."

The judgment of Congress is an exercise of legislative power relative to a matter wholly within its control, and is conclusive. If the sovereign exercises such power once, its power is not exhausted; it may be exercised again for the common good of all. "The power of Congress extends to the whole expanse of a navigable stream and is not dependent upon the depth or shallowness of the water."

The State could not, by conferring authority to create obstructions in navigation, fetter the power of Congress; the action of the State may be superseded by the interference of Congress.

The possibility that the Secretary of War may act arbitrarily or wantonly was mentioned.

It was held that, although the upland owner owned the soil under water to low water mark, such ownership was subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation.

As the shore line — high water mark or low water mark — is in many cases very irregular with deep indentations, the effect of this decision may be very far reaching. Assume that the State should grant lands under water in a deep but narrow bay and that the grantee should fill in and create a straight shore line, could it be to the interest of navigation to establish a harbor line which would necessitate an excavation of the fill so made and the restoration of the shore line to its original location? Would this be the taking of private property for which no compensation should be made? The answer undoubtedly depends on the necessity for the purposes and improvement of navigation.

B. BY THE STATE.

Chapter 763 of the Laws of 1857 was an act to establish bulkhead and pier lines for the port of New York. These lines were established in accordance with a report made by commissioners previously created. A seawall was to be erected on such line from 17th Street to 49th Street. Piers on piles or blocks and bridges and wet basins were provided for. The line of the seawall on the east shore of the Hudson River, along the north shore of Spuyten Duyvil Creek and Harlem River and the north shore of the East River, was described; also along the south shore of East River as well as other parts of what is now Greater New York City.

It was provided that it should not be lawful to fill in with solid material beyond the bulkhead line so established, nor to erect any structure exterior to said line excepting piers,

- (a) Which shall not exceed 70 feet in width, respectively;
- (b) With intervening water spaces of at least 100 feet;

and that it would be unlawful to extend such pier or piers beyond the pier line.

Maps showing the location of said lines, together with a written description, were to be filed in the office of the Secretary of State and in the office of the street commissioner of the City of New York.

Chapter 360 of the Laws of 1858 refers to the lines established under Chapter 763 of the Laws of 1857.

Chapter 522 of the Laws of 1860 was enacted for the purpose of correcting the harbor commissioners' lines and to prevent encroachments and obstructions in the harbor of New York and authorized the removal thereof.

Chapter 150 of the Laws of 1868 limited the extension of piers or wharves in the Harlem River further than the exterior line fixed by the harbor commissioners.

In the same year, by Chapter 288, provision was made for new bulkhead and pier lines on the Hudson and Harlem Rivers and other water front in the City of New York. Limitation in width of piers to 70 feet, with intervening water spaces of at least 100 feet, was re-enacted.

Chapter 534 of the Laws of 1871, being an act relative to the improvement of certain portions of the counties of Westchester and New York, and for improving the navigation of the Harlem River and Spuyten Duyvil Creek, made provision for new bulkheads and pier lines on the Harlem River and other tide waters.

Chapter 378 of the Laws of 1875 amended Chapter 522 of the Laws of 1860 already referred to, being an act to correct harbor commissioners' lines.

1. *New York City Consolidation Act.*

Sections 729 to 735, inclusive, of the New York City Consolidation Act, in force in 1891, have their origin in the laws referred to.

- (a) Grants of land under water are restricted;
- (b) Bulkhead and pierhead lines are provided for;
- (c) Building of piers and other structures regulated.

The right to fill in with earth or other material and to make a solid fill beyond the bulkhead line, or to erect and maintain a pier beyond the pierhead line, is denied.

Section 734 of the Consolidation Act extended the time of completing improvements, such as filling in to the bulkhead line, or constructing piers to the pier line, in cases where letters patent issued by the People required such improvements to be made within a limited time, until after plans for the improvement of the Harlem River should be completed, and copies of such plans filed in the office of the register of the city and county of New York, and in the office of the Secretary of State.

It has been held that the city authorities could not authorize any fill or construction in violation of these limitations, and that a pier erected outside of the pier line fixed under the Act of 1857 constituted a nuisance.¹⁷

The State's right to establish bulkhead and pierhead lines and to regulate the use of granted premises in the interest of the public, for the protection of commerce and navigation, was recognized and sustained even though a grant was made before the Act of 1857 went into effect; no piers could be erected beyond the line fixed by that act.¹⁸

2. *Greater New York Charter.*

These sections of the New York City Consolidation Act have been re-enacted as follows:

Section 729 is now substantially Section 876 of the Charter.

Sections 730 and 731 have been superseded by Sections 817, 818 and 819 of the Charter.

Section 732 has been superseded by Section 819 of the Charter.

Section 734 has been superseded by Section 877 of the Charter.

Section 876 of the Charter restricts the grant of any lands under water by any officer, board or department of the City of New York beyond the exterior lines fixed by the Act of 1857 as amended.

Section 877 of the Charter, like Section 734 of the Con-

17. See *People v. Vanderbilt*, 26 N. Y. 287.

Kingsland v. Mayor, 110 N. Y. 569.

18. See *People v. N. Y. Ferry Co.*, 68 N. Y. 71.

solidation Act, extends the time of constructing bulkheads and piers.

Section 817 of the Charter vests in the Department of Docks and Ferries the power, by and with the approval of the Commissioners of the sinking fund, to fix and establish:

- (a) Lines of solid filling,
- (b) Bulkheads,
- (c) Pierhead lines, and
- (d) Distance between piers.

Section 818 of the Charter gives to the commissioner of docks, subject to the approval of the Commissioners of the sinking fund, very broad powers as to the wharf property, including wharves, piers, bulkheads and structures thereon and water adjacent thereto, and slips, basins, docks, waterfronts, lands under water and structures thereon, which are owned or possessed by the City of New York or *not owned by said city*.

As to such property owned or possessed by the City of New York, the commissioner is given "exclusive charge and control."

As to such property not owned by the City of New York, the commissioner is invested with the "exclusive government and regulation" of same.

Plans for the waterfront of the City of New York are set forth in Section 819 of the Charter, and by Section 820 the commissioner of docks is authorized to cause necessary surveys to be made.

Section 859 of the Charter fixes the rates of wharfage and dockage.

3. *Decisions.*

The bulkhead and pierhead line as established by the Legislature by Chapter 763 of the Laws of 1857 was under consideration in *Dooley v. P. & G. M. Co.*,¹⁹ and in *Matter of City of N. Y.*²⁰

19. 77 Misc. 398; 137 N. Y. Supp. 737.

20. 217 N. Y. 1.

In *Mayor v. C. S. Co.* (61 Hun, 346), it was held that it was one of the purposes of the acts re-enacted as Section 818 of the Charter to restrict structures to the line established and according to the plans adopted, it being the policy to leave the waters between the piers free from any obstruction.

N. Y. C. & T. Co. v. City of New York,²¹ held in effect that the commissioner of docks, without the approval of the commissioners of the sinking fund, had no power to change a pier or bulkhead line which has been established by law.

Various acts relative to the location of pier and bulkhead lines and the powers of the commissioner of docks over same were under consideration.

The statement is found in the opinion of Judge Crane of the Court of Appeals, in *Matter of Public Service Comm.* (224 N. Y. 211, at page 216), that although by the repeal of Chapter 763 of the Laws of 1857 the State could remove all basis for the claim there made, yet so long as this statute remains upon the books and the water must be kept clear for 100 feet from the piers, such rights may exist that if taken away for public purposes the right to compensation would follow.

A more recent opinion by Judge Crane²² reviews the laws and decisions affecting piers and licenses to shed same. The department of docks was created in 1871 and given charge and control of piers. The so-called Shedding Act of 1879 for the first time made it lawful to erect structures upon piers in the City of New York. A pier when shedded under a permit so to do was no longer open to the public, but could be exclusively used by the lessee or owner. It was held that such a permit may be revoked if it contains a condition that it may be revoked.

The legislation regarding the waterfront of the City of New York, as same has been under examination by the court, was discussed at length by Judge Peckham in *Matter of Mayor of New York* (135 N. Y. 253, 61). The early statutes, which conferred

21. 42 Misc. 425; 87 N. Y. Supp. 100.

22. *Matter of City of N. Y.*, 227 N. Y. 119.

upon the city general authority to construct wharves and the decisions under same, were reviewed. The lands under water were conveyed to the city by the Legislature to enable the city to fill in such lands itself or to procure others to do it as the demands of commerce might require. It thus appears that waterfront property may be improved by the State, the City of New York or individuals and that the policy has changed from time to time.

The rights of Congress, the State and the City of New York as well as the public, to lands under water and to improve same for purposes of commerce, were discussed at length in *Appleby v. City of New York*.²³

Judge Chester in *People v. D. & H. Co.* (75 Misc. 322, 135 N. Y. Supp. 339) held that a navigable stream is a public highway in which all the People of the State have an interest and that in the absence of a provision making the State subject to a Statute of Limitations, no title by adverse possession could be acquired against it; that the defendant had not obtained a prescriptive right to maintain a bridge over a navigable stream and that the defendant did not have the right to impair the navigation of the stream; that the defendant might be permitted to build a draw, lift or suspension bridge over the stream, which would not interfere with the navigation of the stream and which bridge would afford railway transportation over the stream. The Appellate Division²⁴ modified the judgment and permitted the erection of a draw, lift or suspension bridge or a bridge supported upon piers which shall leave an open clearance of not less than 50 feet in width and at a specified elevation.

The Court of Appeals²⁵ modified the judgment and held that as the general control of navigable waters is vested in the State, the consent to bridge such waters should come from the Legislature unless the Legislature had delegated its power to give such authority; that the Legislature had not delegated such authority to the courts.

23. 167 A. D. 369; 152 N. Y. Supp. 357.

24. 154 A. D. 909; 139 N. Y. Supp. 392.

25. 213 N. Y. 194.

4. *Generally.*

If a pierhead or bulkhead line is established by the State, and the United States Government establishes a similar line or lines *within* those established by the State, the United States Government line will control.

Chapter 898 of the Laws of 1895 adopted the pier and bulkhead lines around the entire shores of Staten Island, as proposed by the Board of Engineers appointed for the establishment of the harbor lines of New York harbor and waters adjacent thereto, by order of the War Department, and established and confirmed such lines as State lines. It also provided that it shall be lawful to extend or construct piers:

- (a) Not exceeding 150 feet in width,
- (b) With spaces between same of at least 100 feet,
- (c) To the exterior pier lines fixed and established by the act.

It matters not whether the State or the United States establishes a pier or bulkhead line first, or whether either adopts a line established by the other, the location of the line by the United States Government will control.

Other than the Acts of the State Legislature establishing or providing for the establishment of pier or bulkhead lines within the City of New York, the Legislature has not provided for the establishment of such lines. The pier or bulkhead lines which may be found in other parts of the State, to illustrate, Albany, Troy, Oswego, Buffalo, were established by the United States Government.

Fourth. History of Grants of Land Under Water.

Lands under navigable waters have been granted by the Legislature or by the Commissioners of the Land Office. The creation and organization of the Commissioners of the Land Office is set forth in Chapter IV and Chapter XIX.

The history of grants of land under water, sometimes referred to as "water grants," may be found in an opinion of Judge Davies in *People v. The Canal Appraisers* (33 N. Y. 461, at

page 466). The power to grant lands under the waters of "navigable rivers" was conferred in 1786. The power to grant lands under the waters of "navigable lakes" was conferred in 1815. The revision of the Laws of 1830 covered lands under the waters of both navigable rivers and lakes.

Such grants were limited to the proprietor or proprietors of the adjacent lands, sometimes referred to as "uplands." As was stated in *Dooley v. P. & G. M. Co.*,²⁶ this limitation by the Legislature was in recognition of and to protect the common-law right of the riparian owner of access to deep water, which the courts of this State have held to exist independent of statute.

It is within the power of the Legislature, although not of the Commissioners of the Land Office, to grant to one other than the proprietor of the upland, lands under water in front of such upland, but by so doing the common-law right of the upland owner cannot be taken from him or destroyed without compensation. Such a grant to a stranger would, as has been pointed out, be subject to the rights of the upland owner, and would vest "a naked fee."²⁷

The question therefore arises as to what rights an upland owner may have in addition to his common-law rights, by reason of a grant of lands under water made by the Legislature or Commissioners of the Land Office to such upland owner.

In general, an upland owner by reason of a grant of lands under water might have two additional rights:

1. To fill in and make dry land which was before under water;
2. To erect structures thereon of any character.

An exception to this rule may be found in *T. I. S. Co. v. Visger* (179 N. Y. 206). An upland owner maintained docks for his own use and the use of the public. The public had used said docks for the purpose of landing from and embarking on boats and had made general use of such docks. The fact that such docks had been kept open to public commercial uses was held to be of significance, and furnished the basis for an infer-

26. 77 Misc. 398, at page 402; 137 N. Y. Supp. 737.

27. *Harway Imp. Co. v. New York*, 113 Misc. 788 (memo.).

ence of the owner's intention in their construction and maintenance. It was also held that when the upland owner applied for a grant of lands under water, he intended that such public use should continue. The intention of the applicant apparently controlled the purpose for which the application was made and the letters patent were issued, and was held to limit the owner to the use of the docks in the same manner as they were used before the issuing of letters patent by the Commissioners of the Land Office.

The early history of water grants was again reviewed by Judge Chase in *People v. S. P. Co.* (218 N. Y. 459 [see page 469 *et seq.*]).

Under the common law of England, a distinction was made between the

- (a) Ownership of the soil under water, and
- (b) The control over it for public purposes.

The *ownership* of the soil, like the ownership of dry land, was vested in the Crown and regarded as *jus privatum*. The right to the *use* and *control* of both the land under water and the water was vested in Parliament and was deemed a *jus publicum*. The Crown could convey the soil under water but Parliament only exercised control over the waters in the interest of commerce and navigation for the benefit of all of the subjects of the kingdom.

The People of the State of New York succeeded to all of the rights of the Crown and Parliament. All of these rights in and to land under navigable waters and in and to such waters, are now vested in the State. The State, through its Legislature, has and may exercise all the powers which were previously exercised by the King alone or in conjunction with Parliament, limited only by the provisions of the Constitution of this State or of the United States.²⁸

28. *People v. Vanderbilt*, 26 N. Y. 287,

People v. Canal Appraisers, 33 N. Y. 461.

Williams v. City of Utica, 217 N. Y. 162.

People v. S. P. Co., 218 N. Y. 459.

Danes v. State, 219 N. Y. 67.

Which reviewed the various decisions on the subject.

The claim of ownership and the validity of grants made by the State in 1898 covering lands under the waters of Flushing Bay was upheld in *Clarke Estate v. City of New York*.²⁹ The city claimed under Colonial patents dated in 1645, 1666 and 1686; also under an instrument executed by Indian sachems. It was held that, "The Indians had no title which they could grant and which would be recognized in the courts of this country." It was contended by the city that if the premises in question were included in the Colonial grants, "mere inaction upon the part of the former town officials would not operate, either by way of estoppel or waiver, to prevent the city from asserting its present claims." The court answered, "Perhaps not," but that "the best exposition of such a grant is long usage under it." It appeared that, beginning with 1833 and continuing for a period of about sixty-five years, various legislative acts were passed inconsistent with the claim of the city's ownership. In addition, the Commissioners of the Land Office granted thirteen separate parcels of land under the waters of Flushing Bay. The City of New York and its predecessors had notice and made no objection to such grants. The rule of "practical construction" was followed and the city deemed to have no interest in the lands under the water in Flushing Bay.

This rule of "practical construction" has been applied not only with regard to the officers of a municipal corporation, but it has been held that a practical construction of a statute by public officials will be given consideration by the courts.³⁰

In the year 1911, under the direction of Attorney General Thomas Carmody, E. H. Leggett compiled a "History of Water Grants," which contains much useful information and data of a historical nature. See copy thereof — "Appendix XIII."

Fifth. Power to Grant or Withhold Lands Under Water.*

A. INHERENT POWER.

Whether or not the State Legislature directly, or through a duly empowered agent, such as the Commissioners of the Land Office,

29. 165 A. D. 873; 151 N. Y. Supp. 714.

30. *Matter of City of New York*, 217 N. Y. 1, 13.

But see *Smith v. Odell*, 194 A. D. 763, 7.

*See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6777.

has the power to grant lands under navigable waters, has been a mooted question.

In general, the conclusion has been stated time and again that the State holds title to the lands under navigable waters in trust for the People of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, free from the obstruction or interference of private parties. This was substantially held in *Illinois Central Railroad v. Illinois* (146 U. S. 387) 1892.

The Illinois case contains so much of substance relative to the inherent power of the State to grant lands under water that various quotations therefrom are merited. The question at issue was whether the Legislature of the State of Illinois could grant to a railroad company all the right and title of the State in and to submerged lands constituting the bed of Lake Michigan for a distance of one mile from shore. Such grant had been made embracing the whole outer harbor of Chicago, exceeding 1,000 acres.

Three of the Justices of the United States Supreme Court, in a dissenting opinion (page 465), expressed themselves as follows:

“That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.”

Langdon v. New York City (93 N. Y. 129) was cited in support of this conclusion.

Justice Field delivered the opinion of the court which was concurred in by three Justices. The right of the State to grant lands under navigable waters was recognized but limited. The opinion holds substantially as follows:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters belong to the respective States within which they are found, with the consequent right to dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters; that such

doctrine has often been announced by the United States Supreme Court; that the same doctrine is applicable to lands covered by fresh water in the Great Lakes, which possess all the general characteristics of the open sea except that their waters are fresh and the ebb and flow of the tide is absent. In England, the ebb and flow of the tide constitutes the legal test of the navigability of waters, but in this country the case is different.

At page 452: The State holds the title to lands under the navigable waters of Lake Michigan in the same manner that it holds title to soils under tide water, by the common law, but it is a different title from that which it holds in lands intended for sale. It is a title held in trust for the People of the State that they may enjoy the navigation of the waters and carry on commerce over them. The State may grant parcels of submerged lands for the purpose of erecting wharves, docks and piers by way of improving navigation of the waters and no valid objection can be made to such grants. It cannot abdicate its general control over lands under the navigable waters of the entire harbor, bay or lake, as it would not be consistent with the exercise of that trust reposed in it.

An exception is noted, to wit: Such parcels as can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. "It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." The general language found in the opinions of the courts, expressive of absolute ownership and control by the State, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of the State would be absolutely void, but a grant of parcels which can be disposed of without impairment of the public interest in what remains may be made and would be valid.

Numerous New York decisions are cited and the conclusion

is reached that some of these opinions contain expressions which may require explanation when detached from the particular facts of the case.

Although lands under the waters of a lake, and not a river, were involved, a general conclusion was reached that the power to make a grant of such lands *existed*, limited only by the extent of the grant. The size of a parcel which may be granted will depend entirely on the size of the waters covering the underlying land of which the parcel forms a part.

The Illinois decision was criticized in *Sage v. The Mayor* (154 N. Y. 61, at page 78), the court holding that it announced the law of Illinois but not that of New York. Notwithstanding, the Court of Appeals has since followed the Illinois case in *People v. S. P. Co.* (218 N. Y. 459), which involved the question of the power of the State to grant lands under water at Coney Island in Kings County. Three judges of the Court of Appeals held that "an implied reservation of public rights" should be read into the patent. Three of the judges held that the State had the power to grant title to lands under navigable waters unconditionally. Judge Bartlett concurred in the latter conclusion with certain modifications. To quote from his opinion:

"If the grant of lands under water for beneficial enjoyment (or, in other words, in fee simple) was so vast in extent as to amount practically to an alienation of the State's governmental functions along the ocean shore of Long Island, it would, I think, be invalid under the doctrine of *Illinois Central Rwy. Co. v. Illinois* (146 U. S. 387), where the grant exceeded 1,000 acres, embracing the whole outer harbor of Chicago. For example, I should not be willing to construe the statute as authorizing the Commissioners of the Land Office to shut off the public from the entire south shore of Long Island by granting the strand to the upland owners for beneficial enjoyment as a series of amusement parks. But the exclusive grant of a few hundred feet, for enjoyment in a manner which does not interfere with navigation, appears to be sanctioned by the letter and spirit of the law,

whatever we may think of the wisdom of exercising the power. The question, it seems to me, is largely one of degree."

It is to be noted that in the Illinois case the lands were under a lake; in the New York case, the lands were under the Atlantic Ocean, but the principle involved, to quote from Judge Bartlett, is "largely one of degree." So, it should equally apply to lands under a navigable river.

In *People v. A. S. R. Co.*³¹ certain grants of land under the waters of the East River were attacked and the court held that the State had the absolute right to part with its title to lands under navigable waters, following *People v. S. P. Co.* (218 N. Y. 459).

Probably the most extreme opinion in support of the right of the State to grant lands under navigable waters in fee, unconditionally, even though the public right of navigation may be interfered with, is that of Judge Earl in *Langdon v. Mayor* (93 N. Y. 129 at page 156) where he states that the Legislature of this State, excepting as restrained by constitutional inhibitions, could grant the exclusive use of the Hudson River to individuals and could grant in fee any of the inland navigable lakes wholly within this State. This extreme right must be qualified and limited by the rule expressed by Justice Field and Judge Bartlett above quoted from.

Judge Bartlett also expressed his views in an opinion, concurred in by all of the Judges of the Court of Appeals excepting one, in *Matter of Long Sault Development Co.* (212 N. Y. 1, 8) as follows:

"The power of the Legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day. * * * The contemplated use, however, must

31. 98 Misc. 703; 163 N. Y. Supp. 456; af. 182 A. D. 212; 169 N. Y. Supp. 386.

be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public."

He quoted from *Coxe v. State of New York* (144 N. Y. 396, 407) in substance, that the State has the unquestionable right to make grants of lands under navigable waters, in fee, for every purpose which may be useful, convenient or necessary to the public or for the beneficial use of the grantee. Such grants may be made to cities, railroad companies, corporations and private persons. Grants to the owners of the adjacent uplands for beneficial enjoyment have long been authorized and recognized as one of the uses to which the State may lawfully apply lands under water.

With one dissenting vote, the Court of Appeals held that where lands under water had been granted by the State to the City of New York and actually filled in and occupied within the bulk-head line, although no grant had been made by the city to the one so filling in and occupying, title might be acquired by such occupant as against the city, by prescription.³²

It has been held that lands under the navigable waters of bays and rivers could be granted to corporations and individuals under the Roman-Dutch law as existing and practiced in 1644.³³

What the Commissioners of the Land Office may grant they may likewise withhold. Their power to grant cannot be questioned by an individual or individuals or by an officer of a town. When an application is made for a grant, the Commissioners have the right to summarily inquire into the rights of the applicant and to appoint a committee for that purpose. Lands under tide water presumptively belong to the State, and the Commissioners have a right to act on this presumption in the absence of proof to the contrary.

The Commissioners are clothed with a discretion as to whether

³². *Matter of City of New York*, 217 N. Y. 1.

³³. *Grace v. Town of No. Hempstead*, 166 A. D. 844; 152 N. Y. Supp. 122; *af.* 220 N. Y. 628 (no opinion).

a grant shall be made or not and this discretion may not be controlled. The determination of matters within their jurisdiction which are confided to their discretion is not reviewable. The judgment of the Commissioners as to the necessity or extent of grants should not be interfered with at the instance of individuals. The Legislature in authorizing the Commissioners to grant lands under water did not make such authority dependent upon whether the lands were or were not used by the public. It cannot be said as a matter of law that the interest of the public required the Commissioners to deny an application.³⁴

These questions were again brought to the attention of the court in *People ex rel. Tracy v. Woodruff*,³⁵ which stated that the object of the act authorizing the Commissioners of the Land Office to make grants was to prevent the necessity of frequent applications to the Legislature. The Commissioners were vested with a discretion to make or not to make a grant and their action is subject to review by the courts only when they exercise judicial functions in the performance of their duties. To illustrate: If they determine the ownership of uplands and such determination is claimed to be erroneous it may be reviewed.³⁶

To quote from the opinion (p. 5):

"The relator's ownership of the adjacent upland gave him no title to the land under water in front of his premises (*People v. New York & Staten Island Ferry Co.*, 68 N. Y. 76), and whatever may be his right of access to the water and other rights as riparian owner, he cannot demand or compel a grant to him from the State of the land under water. He has no legal right to such a grant, the giving or withholding of which rests, I think, entirely in the discretion of the Commissioners of the Land Office."

The City of New York has been held to have no controlling voice as to whether a grant should issue or not. The fact should not be overlooked, however, that the Legislature has given to the

34. *People ex rel. Underhill v. Saxton*, 15 A. D. 263; 44 N. Y. Supp. 211; *af. 154 N. Y. 748* (no opinion).

35. 54 A. D. 1; 66 N. Y. Supp. 209; *af. 166 N. Y. 597* (no opinion).

36. *People v. Jones*, 112 N. Y. 597.

City of New York certain rights and powers under its charter,³⁷ and that the Commissioners of the Land Office might attempt to impose conditions inconsistent therewith. If the Commissioners required piers to be built with a space of less than one hundred feet between, it would be inconsistent with the charter requirements. Illustrations may be multiplied.

Section 86 of the Greater New York Charter provides for the issuance of letters patent to the City of New York or to a riparian proprietor, and further provides that if the riparian proprietor shall apply to the Commissioners of the Land Office for a grant of land under water, the board of docks of the City of New York shall examine such application and certify to the Commissioners whether the granting of the application will conflict with the rights or public interests of the City of New York. The powers of the board of docks have been held to be purely advisory. The board cannot determine whether a grant should be made or recommend that no grant be made; the board of docks can only recommend that the grant be made upon certain terms and conditions which the Commissioners of the Land Office are bound to consider. But the ultimate determination rests with the Commissioners of the Land Office.³⁸

B. LIMITATIONS.

The power to grant lands under navigable waters, even with the limitations above expressed, has not always been recognized by the courts. In *Sage v. The Mayor* (154 N. Y. 61, at page 79), Judge Vann stated that in every grant of land where the tide ebbs and flows there is reserved by implication the right to so improve the waterfront as to aid navigation for the benefit of the public without compensating the riparian owner; that under the common law navigation was of "paramount" importance.

Judge Gray, delivering the opinion of the court, in *Slingerland v. I. C. Co.* (169 N. Y. 60, at page 72) expressed the view that "the State could not grant an exclusive right."

37. See Third, B. 2, hereof.

38. *People ex rel. City of New York v. Woodruff*, 39 A. D. 123; 56 N. Y. Supp. 681; *af. 159 N. Y. 536* (no opinion).

People ex rel. City of New York v. Woodruff, 166 N. Y. 453.

In the much cited case of *Thousand Island Steamboat Co. v. Visger* (179 N. Y. 206, at page 213), Judge Gray again stated that the State officers "were without any power to make an unqualified grant."

In July, 1918, Judge Benedict at Special Term, Kings County,³⁹ denied that the Legislature had the power, either by direct action or otherwise, to grant lands under water, contending that they were held by the Legislature in trust for the common use and benefit of all of the citizens of the State and that they are inalienable.

In the same month, the Court of Appeals in *Matter of Public Service Comm.* (224 N. Y. 211), following an Illinois case reported in 201 U. S. 506, held that "title to land under a navigable river is not the same as the title to the shore land; that in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed."

The City of New York was seeking to acquire lands under the East River for the purposes of a tunnel and it was held that in so doing the city did not affect the right of the public to navigate in the waters over the lands through which such tunnel was to be located or to use the slip located upon such lands. The city was held to take and hold the fee of the prior owner which had been granted to him subject to the right of navigation existing in the State. The owner of an adjoining pier would, therefore, not be prevented from using the slip over the tunnel and would not be entitled to compensation as a result of such taking.

In the *Matter of the City of New York* (216 N. Y. 67), the rule was laid down that the public under the common law of the State has a right to pass from a street end which stops at high water mark, over and across intervening lands, to reach navigable waters; the right exists to pass from the land highway to the water highway and *vice versa*, irrespective of the fee ownership of intervening lands. The right of the fee owner to use such lands for other purposes was recognized, so long as such use did not

³⁹. *Matter of Aquino v. Riegelman*, 104 Misc. 228; 171 N. Y. Supp. 716. See also 173 N. Y. Supp. 917.

bar the people from reaching the water from the street end or the street end from the water. Notwithstanding this right of public passage, and apparently as an exception to the general rule, when the city sought to take the fee between the high water line and the water, the same having previously been granted by royal grant, the fee owner was held to be entitled to substantial damages.

In "Appendix XIII," following, reference is made to a report by Secretary of State McDonough to the Commissioners of the Land Office in which he contended that the Commissioners were unauthorized to make full beneficial enjoyment grants, urging that the State holds such lands in trust for the public and for no other purpose, and that grants could be made only for public or *quasi*-public purposes.

Attorney General Carmody in 1913 reported to the Commissioners of the Land Office that in making a grant of lands under water there was always involved the legal principle that the grant was made subject to revocation by the State under its trust powers for the benefit of the People of the State.

The authorities are almost unanimous that the Legislature cannot grant or authorize the grant of lands under navigable waters if large tracts or parcels are involved which will destroy navigation or preclude the public from large areas. But assume that such a grant should be made; the question arises as to the remedy. A grant was made of a large area of land under water within the limits of the counties of Kings, Queens, Richmond and Suffolk. The grant was made by Chapter 864 of the Laws of 1868, to the Marsh Land Company, and when the full scope and effect of the act was realized it became the subject of investigation by the Legislature; the Judiciary Committee of the Senate reported and expressed "in strong language a very unfavorable opinion with respect to the validity and propriety of the legislation." The matter was referred to the Attorney General, "who responded in an elaborate opinion, containing views equally unfavorable."

In 1875 the Legislature, by Chapter 257, repealed the Act of 1868 so far as it gave to the company power to acquire title to lands under water.

The Court of Appeals, in an extended opinion,⁴⁰ held that the title of the State to the lands in question could not be surrendered, alienated or delegated except for some reasonable use which can fairly be said to be for the public benefit; that the grant made by the Legislature was not within the limits of the powers possessed by the State and did not constitute a contract between the State and the grantee beyond the power of revocation by a subsequent Legislature. The Repealing Act of 1875 was sustained and the company was held to have no claim against the State by reason of such repealing act.

*Appleby v. City of New York*⁴¹ refers to the Hudson River as a navigable stream and describes the right of the individual under a patent, subject to the control by the State and Federal Government. The patentee has no right to fill in beyond the bulkhead line.

The right of the Legislature directly or through the Commissioners of the Land Office to grant a particular parcel of land under navigable waters, and the validity of any such grant which may have been made, must be measured by the rule laid down by Justice Field and Judge Bartlett.⁴²

As long as the public interest shall not be substantially impaired or the rights of the public in the natural highway for navigation interfered with, no one can be heard to complain. To that extent, lands under water may be granted in fee and filled in to the bulkhead line.

If this were not so, much land formerly under navigable waters but since granted, filled in and built upon, could be recovered by the State without any liability. Under such grants from 1786 to the present time, and upon the faith of the title to lands so granted, buildings worth millions of dollars have been built and enjoyed. "Titles founded upon such grants are to be found in every city, village and township bordering upon public waters."⁴³

40. *Coxe v. State*, 144 N. Y. 396.

41. 167 A. D. 369; 152 N. Y. Supp. 357.

42. 146 U. S. 387; 218 N. Y. 459.

43. 218 N. Y. 459, 71.

When it is said that in every grant there is reserved to the State the right to improve the water front or navigation, or that "the State could not grant an exclusive right" or was "without any power to make an unqualified grant," no more can be meant, when applied to a comparatively small parcel, than that the State could not preclude itself from retaking by appropriation or condemnation. Having granted such small parcel, and having taken compensation, it cannot retake without liability. The right to retake *always* exists. The question is only one of liability. As was said by Judge Earl:⁴⁴ "When *valid* grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation."

C. BY LEGISLATURE OR LAND BOARD.

Grants of lands under navigable waters have been made directly by the Legislature or by the Commissioners of the Land Office, otherwise known as the Land Board, for more than 130 years. The first grant made by the Land Board was in 1786 to Ezra Reed of lands under the waters of the Hudson River at Hudson, N. Y.⁴⁵ The "History of Water Grants"⁴⁶ shows numerous grants made directly by the Legislature; others by the Land Board under general authority of the Legislature, and still others under specific authority.⁴⁷

An instance of a grant or attempted grant directed by the Legislature is Section 83 of the Greater New York Charter, which grants in fee to the City of New York all right, title and interest of the People of the State in and to lands under water embraced within the projected boundary lines of any street intersecting the shore line. The same section, however, provides for a grant of such lands by the Commissioners of the Land Office. This section was under consideration by the court in the Matter of McClellan.⁴⁸ It was held that although this section of the Charter might not be

44. 93 N. Y. 129, 57.

45. 218 N. Y. 459, 71.

46. Appendix XIII.

47. See also *People v. Canal Appraisers*, 33 N. Y. 461.

48. 146 A. D. 594; 131 N. Y. Supp. 633; *af.* 204 N. Y. 677.

considered as a completed grant "it certainly amounts to a permanent appropriation to the uses of the City of New York of all the lands under water described therein, and it was no longer within the power of the Commissioners of the Land Office to make any grants in fee, or otherwise, inconsistent with the provisions of said section."

The Legislature in making a grant must do so by a two-thirds vote or no fee will pass.⁴⁹

In 1807 the Legislature passed an act directing the Commissioners of the Land Office to issue letters patent to the City of New York covering lands under water along the easterly shore of the North or Hudson River; also along the westerly shore of the East River, but the upland owners were given the pre-emptive right to acquire such lands under water in front of such uplands, by grant from the City of New York. Similar grants have been made to the City of New York covering other lands under water within that city.

It is of significance that the Act of 1786⁵⁰ provided that all letters patent thereafter granted "shall vest the lands in fee simple," although the same act also provided that it shall be lawful to grant lands under navigable waters as the Land Board may "deem necessary to promote the commerce of this State."

Under such power to grant to *promote commerce*, "fee simple" grants were made for nearly fifty years.

Chapter 232 of the Laws of 1835 limited the powers of the Land Board; power to authorize the erection of docks and the collection of dockage only was conferred.

Chapter 283 of the Laws of 1850 again conferred power upon the Land Board to grant lands under water "for the purpose of beneficial enjoyment" as well as to promote commerce. And this power still exists.

The general power to make grants as conferred on the Land Board may be summarized as follows:

49. *F. C. Co. v. State*, 221 N. Y. 295.

50. Chapter 67, *Laws of 1786*.

1786 to 1835 — in fee simple to promote commerce.

1835 to 1850 — to erect docks only.

1850 to date — to promote commerce or for beneficial enjoyment.

The Legislature has generally authorized the Land Board to make grants by letters patent in such words and form as the Board may prescribe or direct. The Public Lands Law so provides at present. (See Section 5 thereof.)

D. TO UPLAND OWNER.*

The Legislature may grant lands under navigable waters directly to anyone, subject to the common-law rights of the upland owner, but it has limited the Commissioners of the Land Office to making grants to upland owners only (Section 75, Public Lands Law), or to the City of New York (N. Y. City Charter, §§ 83 and 86). This makes necessary a determination on the part of the Commissioners as to the ownership of the upland, which is a judicial function and may be reviewed by the courts.⁵¹

It has been held that an upland owner is no less an upland owner if he dedicates the lands fronting on navigable waters to the use of the public for highway or street purposes, retaining the title to the lands so dedicated, and that he does not lose his riparian rights.⁵²

Where a highway or street borders navigable waters and there are no lands between such highway and waters, the owner of the fee of the lands within the highway or street has been held to be entitled to a grant of lands under water, rather than the person owning the interior lands, in case the same person does not own the fee to the lands within the highway as well as the interior lands.⁵³

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, pp. 6776, 7.

51. *People v. Saxton*, 15 A. D. 263; 44 N. Y. Supp. 211; af. 154 N. Y. 748. *People ex rel. Tracy v. Woodruff*, 54 A. D. 1; 66 N. Y. Supp. 209; af. 166 N. Y. 597.

52. *Moenig v. N. Y. C. R. R. Co.*, 187 A. D. 323; 175 N. Y. Supp. 665, and cases cited.

53. *People v. Colgate*, 67 N. Y. 512.

The owner of uplands on a sale of a strip along the water front may reserve riparian rights.⁵⁴

A grant should not be made to one tenant in common, but if so made, it might enure to the benefit of all the co-owners.⁵⁵

1. *Railroad Companies.*

An exception is found to the limitation imposed upon the Commissioners of the Land Office to making grants to upland owners only, the Legislature having authorized the Commissioners to convey lands to a railroad company for the purposes of its road. The present authority to grant State lands to railroad corporations is found in Section 18 of the Railroad Law. The original authority was Section 25, Chapter 140, of the Laws of 1850.

A grant of land under navigable waters to a railroad company would be subject to the riparian rights of the upland owner.

In the construction of railroads, streams are often followed. This was especially true in the construction of railroads along the Hudson River, the shore line of which was very irregular in parts. At places the railroads were constructed wholly upon the upland, a right of way for which was secured by the railroad company by purchase or condemnation. Strips were left between the railroad right of way and the waterfront. No claim could be made that the railroad company was the upland owner where such strips were left.

At other places, where bays were encountered, the railroad was built across same, leaving water between the railroad and the upland. The railroad was built either by virtue of general legislative powers conferred or a grant secured from the Commissioners of the Land Office of a strip of land under water.

In the last two instances, the upland owner continued as such and the railroad company had no riparian rights.

At still other places, the center line of the railroad coincided with the high water mark — a portion of the railroad was built upon upland, title to which was secured by purchase or condemnation, and a portion on lands under water, which was occupied under

54. *People ex rel. Burnham v. Jones*, 112 N. Y. 597, 606, *dicta*.

55. *Opinion of Attorney General*, 1894, p. 90.

general legislative authority or a grant from the Commissioners of the Land Office. Such situations have presented the question as to whether the railroad company thereupon became the upland owner and have been a source of litigation.

Again it is found that a railroad company has acquired all the land between that required for right of way purposes and the high water line. Sometimes this is a long narrow strip extending for a considerable distance. At other times, it will consist of a piece of land extending only a short distance along the right of way but for some distance away from the right of way. These strips and parcels may not be occupied for railroad purposes or there may be built thereon stations, freight houses or other structures necessary in the operation of the railroad. There may also be a dock or landing place for freight or passengers.

Such situations have also presented the question as to whether the railroad company is an upland owner and, as such, entitled to a grant of lands under water to the exclusion of the one owning lands in the rear and on the opposite side of the railroad right of way.

There are numerous decisions which were reviewed by Judge Blackmar of the Appellate Division, Second Department, in an opinion rendered in April, 1919, in *Moenig v. N. Y. C. R. R. Co.*⁵⁶

In general, the acquisition of title by a railroad company, by deed or condemnation, of lands paralleling the waterfront, for right of way purposes, *i. e.*, for the purposes of laying tracks and the operation of trains thereover in passing to and fro between stations, will not constitute the railroad company an upland owner so as to limit the Commissioners of the Land Office to making a grant to the railroad company only. Notwithstanding, the ownership of the railroad company and the construction of the roadbed along the waterfront, the owner of the interior lands bordering the railroad right of way will still be the upland owner and entitled to a grant of lands under water on the opposite side of the railroad right of way. This would be true even though the railroad company has acquired a strip wider than necessary for its roadbed.

56. 197 A. D. 323; 175 N. Y. Supp. 665.

An exception to the rule has been recognized in a case where a railroad company acquired a parcel or parcels of land between its right of way and navigable waters on which it located a station, freight house or other railroad buildings, and, in particular, a dock or landing place. As expressed by Judge Cullen in *Matter of City of Buffalo* (206 N. Y. 319), "it is theoretically possible at least that the railroad company may have riparian rights attached to certain of the pieces of land owned by it. It is equally possible that they have no rights of the kind. The question depends on the terms and character of the conveyances by which the lands were granted to it."

The rights of the railroad company would, therefore, depend on two things:

- (a) The terms and character of the conveyances under which it holds; and
- (b) The use to which the lands may be or are being put.

Assume that the railroad right of way extends along the shore but entirely upon the upland for a considerable distance along navigable waters and that the railroad company has acquired title to all of the lands between its roadbed and the navigable waters for a distance of several miles; that there are no villages or buildings along the roadway. The railroad company would not then be an upland owner entitled to a grant. But, if buildings should be erected and a village spring up at some point along the railroad, necessitating the construction of a passenger and freight station or a landing place on the land owned by the railroad company between its roadbed and the water, the company may become an upland owner as to land so occupied, so as to entitle it to a grant of lands under water lying in front thereof, to the exclusion of the owner of the lands lying on the opposite side of the railroad lands and right of way.

In some instances the upland owner has secured a grant to adjacent lands under water before the railroad company acquired its right of way. This would present the question as to whether the railroad company in acquiring title to a strip of uplands also acquired title to the adjoining lands under water. The general

rule is that a grant of uplands carries title to the adjoining lands under water when owned by the grantor, unless expressly excepted.⁵⁷

2. *Adjacent Owner.*

"Adjacent," as used in Section 75, Public Lands Law, and "adjoining" have been held to mean "in actual contact" and exclude the idea of any intervening space. If any land intervenes that granted and the upland, it will be presumed to pass.⁵⁸

Sixth. Letters Patent * — Forms and Effect.

The forms of letters patent which have been adopted from time to time have not been uniform. It is, therefore, a question of what the Land Board conveyed or attempted to convey as well as what power existed to convey. "Appendix XIII" sets forth various forms of letters patent which were adopted by the Land Board and subsequently used. These forms contained restrictions, reservations and conditions. Other general forms were adopted and used and numerous special forms were used in particular instances.

A. EARLY COMMERCE GRANTS.

Although the Act of 1786⁵⁹ provided that letters patent should "vest the lands in fee simple," the authority vested in the Commissioners of the Land Office was to grant lands under water "to promote the commerce of this State." It is of importance to determine whether these were intended as words of limitation and whether the holder of such a patent was limited in the use which he could make of the lands granted. It has been contended that such a grant does not permit the building of manufacturing plants, mercantile establishments or dwellings, but that the lands could only be used for the purpose of building docks and docking boats and discharging and landing merchandise and passengers to and from such boats, and the maintenance thereon of storage sheds for

57. *Smith v. Bartlett*, 180 N. Y. 360.

58. *Bardes v. Herman*, 62 Misc. 428; 144 A. D. 772; 129 N. Y. Supp. 723; af. 207 N. Y. 745.

* See also *Weed's Practical Real Estate Law*, p. 1231.

59. Chapter 67, Laws of 1786.

merchandise in transit, and of loading and unloading machinery and appliances.

Abbott v. Curran (98 N. Y. 665), in construing a patent, held:

“That the grant was made for commercial purposes only and for the benefit of commerce. But this language in the grant did not impose either a condition precedent or subsequent, or *any restrictions upon the absolute title.*”

This decision was cited apparently with approval in *People v. S. P. Co.* (218 N. Y. 459, at page 476).

It might have been the intention of the Legislature in 1786, by using the words “to promote the commerce of this State,” that the public might use lands formerly under water even after they were granted and filled in, subject to the payment of dockage to the patentee. The same intention might have been in the minds of the Commissioners of the Land Office, but, as was stated in the case last cited at page 469, “if it had been their intention to reserve to the public a right of passage over the lands included in the grant, they would have provided therefor as they did” in another grant. In other words, the limitation should have been specific. See also *Wetmore v. B. G. L. Co.* (42 N. Y. 384, 92).

Regardless of these conclusions, the words “commerce” and “commercial purposes” have been defined by the courts and given a more limited meaning. “Commerce” has been defined as the *transportation* of goods, wares, merchandise and persons. It has been held to embrace the shipment or interchange of manufactured products and not to extend to the *manufacture* of such products. Chief Justice Marshall of the United States Supreme Court said “commerce undoubtedly is traffic.” Justice Lamar, of the same court, said:

“No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are dif-

ferent. The buying and selling and the transportation incidental thereto constitute commerce.”⁶⁰

There are numerous decisions to the same effect, although not growing out of an interpretation of a commerce grant.⁶¹ Under this limited application of the word “commerce” it might well be contended that no right would exist under a commerce grant to erect manufacturing plants.

By Chapter 856 of the Laws of 1866 (Section 4), the Legislature provided that “warehouses and other structures” might be erected for “commercial purposes.”

B. LICENSES TO ERECT DOCKS.

It was not until 1835 that the Commissioners of the Land Office were limited in their power to authorize only the erection of docks to promote the commerce of this State and the collection of dockage from persons using such docks, to be regulated by the Legislature.

Following this limited authority, the Commissioners in 1839 adopted a form of letters patent under which there was granted only the power and authority to erect docks and collect dockage. This has been referred to as a “license” to erect docks and the form was in use until 1853.

It is to be noted that whereas previous to the Act of 1835 *lands* under water were granted, subsequent thereto lands were not granted but only the power and authority to erect docks thereon, which would include the right to fill in to the bulkhead line. Even so, the Court of Appeals has held that where a license to erect docks and fill in was granted, if the filling is made, the license may ripen into a “title.”⁶² The court did not say that a “fee title” would pass but held that the license until exercised consti-

60. *Gibbons v. Ogden*, 22 U. S. 1, 190.

61. *Lottery Case*, 188 U. S. 321, 52.

R. R. Co. v. Fuller, 84 U. S. 560, 8.

Mobile v. Kimball, 102 U. S. 691, 9.

U. S. v. Knight Co., 156 U. S. 1.

Kidd v. Pearson, 128 U. S. 1.

Opinion of Justices, 204 Mass. 607.

Queens Terminal Co. v. Sehmuck, 147 A. D. 502; 132 N. Y. Supp. 159.

62. *F. C. Co. v. State*, 221 N. Y. 295.

tuted a right which may "aptly be termed a franchise," which when exercised by filling in would give rights and privileges of which the grantee could not be deprived without compensation.⁶³

The form of license to erect docks was considered by the Court of Appeals in an earlier case — *Harper v. Williams* (110 N. Y. 260). It was held to confer the right to maintain a wharf or dock not for private use but for the use of the public, *i. e.*, "for the whole State," subject to the payment of dockage to the patentee.

In *Andrus v. N. S. R. Co.*⁶⁴ the right was defined as a "franchise — an incorporeal hereditament." The right was held to pass by a deed of lands authorized to be improved, and it was also held that a right of way or easement may be created by an exception or reservation in such deed.

C. COMMERCE AND BENEFICIAL ENJOYMENT GRANTS.

Under the Act of 1850, the Commissioners might grant lands under water *to promote commerce or for the purpose of beneficial enjoyment*. If a distinction existed, it was not recognized, as the forms used were generally in the alternative and provided that the grant was made for the purpose of promoting commerce or for the purpose of beneficial enjoyment. Such form of grant could hardly limit the use to which the lands granted might be put and make unlawful the erection of factories and other permanent structures.

During the past fifty years, so-called "commerce grants" and "beneficial enjoyment grants" have been issued in various forms. Some of these were under consideration in *People v. A. S. R. Co.*,⁶⁵ where it was held that "a grantee of land under water for the purpose of promoting commerce may erect private manufacturing plants and is not restricted to the erection of docks to which the public has the right of user."

Notwithstanding, a distinction has been made when so-called "commerce grants" were issued. Attorney General Rosendale reported to the Land Board in 1892 that:

63. 221 N. Y. 295, 316.

64. 72 A. D. 551; 76 N. Y. Supp. 530.

65. 98 Misc. 703; 163 N. Y. Supp. 456; *af. 182 A. D. 212*; 169 N. Y. Supp. 386.

“The practice of the Land Board in fixing the consideration of these grants has been uniform. In the cases of grants for commerce, only a nominal sum has been charged, whereas in grants for beneficial enjoyment the full appraisal value has been required.”

This practice may be subject to criticism in view of the opinion of Judge Earl in *Smith v. The Mayor* (68 N. Y. 552). Lands under water belonged to a city, which granted the right to construct and maintain a pier thereon. It was held that the pier was real estate and that the owner of such pier had “every benefit from the land upon which the pier is placed which he could have if he owned the fee therein. His right is perpetual to him, his heirs and assigns forever.”

It would therefore appear that the right even under a license to erect docks has value, *i. e.*, more than a *nominal* value.

This question does not seem to have been before the courts very frequently. It was involved in a dock proceeding in the City of New York, conducted in 1909, when certain lands were taken from the Empire Refining Company, Limited. The proceeding was entitled “In the matter of Whale Creek.” The lands had previously been granted by the State under a commerce grant. The theory applied by one of the witnesses to all of the East River waterfront was that the value of the upland had been increased 10 per cent. by reason of the water grant, *i. e.*, the State grant for commerce. The award made by the Commissioners was in round figures \$480,000. The corporation counsel complained that this was in excess of the value of the interest being taken from the claimant, who had only a grant for commerce, and the court reduced the amount of the award \$100,000 or over one-fifth. The claimant took no appeal on account of the reduction.

In 1894 the Land Board adopted rules and regulations relative to the forms of letters patent. Three separate and distinct forms were adopted, namely:

- (a) Commerce grants;
- (b) *Full* beneficial enjoyment grants, and
- (c) *Restricted* beneficial enjoyment grants.

Copies may be found in "Appendix XIII," following resolutions of the Land Board passed in 1894.

1. *Commerce Grants.*

It is to be noted that under commerce grants, the *lands were granted* for the purpose of building a "public dock" and for no other purpose. These words of limitation are very different from those found in the early "commerce" grants, which contained no conditions or reservations.

The form of commerce grant adopted in 1894 with certain additions continued in use until February 1, 1921.

2. *Full Beneficial Enjoyment Grants.*

The form of full beneficial enjoyment grant adopted in 1894 granted lands under water absolutely without any restrictions and purported to grant the fee simple title. It was not used after 1899, following the report of Secretary of State McDonough.

3. *Restricted Beneficial Enjoyment Grants.*

The form of restricted beneficial enjoyment grant adopted in 1894 with certain additions continued in use until February 1, 1921.

If *lands* are granted either for commercial or beneficial enjoyment, although under a commerce grant the right to erect and maintain a *public* dock only is conferred, the fee would pass but the use would be limited or restricted, and the value of the land would naturally be less than if it might be filled in and used for any and all purposes.

A distinction between a restricted and full beneficial enjoyment grant and the value of each was referred to in *People v. S. P. Co.* (218 N. Y. 459, at page 468). Lands under a restricted grant were appraised at \$580 and under a full beneficial enjoyment grant at \$871.25.

D. RESTRICTIONS — GENERALLY.

Whether or not the fee title passed under a particular grant, numerous restrictions as to the use of the land granted or in con-

nection with the right, power and authority conferred, were contained in the letters patent after 1832.

The amount of dockage which could be charged under the license to erect docks was to be regulated by the Legislature.

Later grants for the purpose of promoting commerce or for beneficial enjoyment also contained restrictions of a similar nature.

The form of commerce grant in use since 1894 limits the use of the land to the building of a *public* dock.

Special forms are sometimes used containing specific restrictions.

Harper v. Williams (110 N. Y. 260), already referred to, interpreted the particular grant before the court as restricting the use to which lands could be put, namely, for the purpose of building a dock for the use of the People of the whole State, subject to the payment of dockage. No lands were granted; only a license or franchise.

Although many restrictions are found in earlier patents, the word "restricted" was first generally used in 1900. When used generally and not specifically, it can take nothing away from the right and title granted, which must be held to be a fee absolute. To call a grant a restricted beneficial enjoyment grant, and not specifically restrict the use to which the lands granted might be put, is ineffectual.

A right to restrict the use of lands granted may be reserved and be a continuing right which might be exercised at any time. Some question might arise, however, in case the Legislature should now attempt to restrict the use of lands granted under beneficial enjoyment grants made several years ago, containing a general reservation of a right to restrict.

Langdon v. The Mayor (93 N. Y. 129, at pages 145-8) holds in effect that a restriction is generally ineffectual unless specific in terms; it should be construed in favor of the patentee and against the State.

In T. I. S. Co. v. Visger (179 N. Y. 206) the court held that a patentee was restricted in his right to use a dock; that he could not use it exclusively, but that the public may also use same as it did before the patent was issued.

A specific restriction as to use was under consideration in *Barnes v. M. R. R. T. Co.* (193 N. Y. 378).

If a grant is made to promote commerce or for commercial purposes, the question is presented as to whether the patentee is restricted in the use he can make of the lands granted, and if the grant is made for the purpose of erecting and maintaining a *public* dock only, whether this results in an added restriction. The answer must be found in the definiteness of the restriction. See also *Sixth, A.*, hereof — Early commerce grants, and *C.*—Commerce grants.

The grants made prior to 1835 and the licenses between 1835 and 1850, in so far as any limitation was imposed as to the use and maintenance of docks, referred to both private and public docks. If the patentee was limited in his authority to collect dockage, to be regulated by the Legislature, the dock would become a public dock in the sense that the public could use same by the payment of dockage.

A private dock in the strictest sense is one used by an individual in the transportation of his own products. A dock is also private when exclusively used by one engaged in the transportation business. If thrown open to the public, which could be charged statutory dockage or wharfage, the dock would lose its private character and become public.

In the City of New York there are practically no public docks at the present time except those owned by the State or City of New York. Wharfage is charged at all of the public docks owned by the City of New York at statutory rates of wharfage.⁶⁶ Practically all of the docks in the City of New York are privately owned and privately used by the owners or lessees in connection with their private business of transporting their own or others' products, although at times vessels owned or operated by others are allowed to land. These docks are generally covered by sheds, the erection of which, in effect, changes a public into a private dock.⁶⁷

66. See Section 859, N. Y. City Charter.

67. See Section 844, N. Y. City Charter.

Chapter 249 of the Laws of 1875 provided for the erection and maintenance of sheds upon *piers* or *bulkheads* in the City of New York, upon license from the department of docks. A railway company secured from the department of docks permission to construct a shed upon a pier. An action was brought in the name of the People by the Attorney General to remove the shed upon the theory that the shed was unlawful and resulted in an exclusive possession and use of the pier by the railroad company for its corporate purposes. The Court of Appeals in *People v. B. & O. R. R. Co.* (117 N. Y. 150) held that the permission to shed a pier, under the act, amounted to the turning of a public pier into a private one, and that such was the effect of the action of the Legislature in delegating to the dock department the power to issue licenses for the erection of sheds.⁶⁸

It thus appears, although the Commissioners of the Land Office have since 1894 been issuing so-called commerce grants containing a restriction that the premises are to be used by erecting thereon a "public dock," that the patentee may immediately apply to the department of docks in the City of New York, and upon securing a license, might convert a public pier into a private one.

Whether one uses dock lands for the manufacture of products or for shipping such products, may make little difference to the public, but the public is concerned if it has a right to use such dock for general shipping purposes on the payment of wharfage. The same reasoning would apply as in the operation of boats, trains or trucks for private or public use. If every commerce grant should be considered a franchise for the benefit of the public, but under the control of the patentee, subject to statutory rules and regulations, the public would have the same rights over lands granted thereby as they would have upon a public boat, train or truck.

The 1894 form of commerce grant used the term "dock." The word has been variously defined but is generally considered as a place where boats may anchor and be loaded or unloaded. This

68. See also *Matter of City of New York*, 227 N. Y. 119.

would include a "pier" and "bulkhead" mentioned in the Act of 1875. It would also include a wharf.

The subject of restrictive covenants was considered by Judge Werner in *Korn v. Campbell* (192 N. Y. 490). He specified three classes of restrictive covenants and stated that "the cases abound in fine and subtle distinctions;" that the decisions appear to be in hopeless conflict but are easily reconcilable when properly divided into three classes as follows:

"In the first class may be placed those which are entered into with the design to carry out a general scheme for the improvement or development of real property. This class embraces all the various plans, generally denominated in the English cases as building schemes, under which an owner of a large plot or tract of land divides it into building lots to be sold to different purchasers for separate occupancy, by deeds which contain uniform covenants restricting the use which the several grantees may make of their premises. In such cases the covenant is enforceable by any grantee as against any other upon the theory that there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy. Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract. * * *

"The second class embraces those cases in which the grantor exacts the covenant from his grantee, presumptively or actually, for the benefit and protection of contiguous or neighboring lands which the former retains. In such cases the grantees, if there are more than one, cannot enforce the covenant as against each other, although the grantor, and his assigns of the property benefited, may enforce it against either or all of the grantees of the property burdened with the covenant. * * *

"Then there is a third class, where there are mutual coven-

ants between owners of adjoining lands in which the restrictions placed upon each produce a corresponding benefit to the other, and in such a case, of course, either party or his assigns may invoke equitable aid to restrain a violation of the covenant. * * *

Illustrations of each of the three classes are cited.

Restrictions contained in letters patent would fall under the second class, for the benefit of the grantor — the People of the State of New York.

See also on the subject of restrictive covenants the opinion of Judge Chase in *Bull v. Burton* (227 N. Y. 101).

E. RESERVATIONS.

The right of the State through its Legislature to regulate dockage, and the right of entering upon and using lands granted the same as if not granted unless the patentee performs certain specified acts, has been reserved in and by many of the patents issued, and such reservations were contained in several of the general forms adopted — in particular, those used since 1894, since which time the practice has been more uniform.

The right of re-entry was reserved until the property granted should be filled in, enclosed by a sea-wall, occupied and covered by structures, docks or buildings of a permanent character, usually within a limited period of five years. This period, however, varied in different grants.

Reservations should be specific. (P. 291.)

F. CONDITIONS.

In addition to imposing restrictions as to the use of lands granted and to reserving certain rights therein, including the right of re-entry, grants have been made on *condition* that general or specified improvements be made within a limited period. It becomes necessary to examine each grant in order to determine the conditions imposed.

The grants made in recent years were upon the express condition that the State of New York or the City of New York may at any time acquire the premises granted by paying the amount

paid by the patentee for the lands, plus the cost of acquiring the patent, together with the value of improvements made upon the premises.

These grants were also made upon the express condition that the grantee shall acquire no right, title or interest in the premises granted unless he performs certain specified acts within a limited time; that on the failure to perform such acts title shall remain in the People as if the letters patent had not been issued.

The general language used cannot at all times be interpreted and has in some instances been criticized by the courts. It is not always definite, specific and certain as conditions should be.

The 1894 forms are among the best considered. They specifically provide that the grant is made upon the express condition that no right, title or interest shall be acquired by the patentee unless within five years certain improvements shall be made.

None of the general forms required as a condition that slips or basins should be maintained, although "necessary approaches" are provided for in the 1894 commerce grant.

Judge Kellogg, writing a dissenting opinion in *Palmer v. State*,⁶⁹ expressed the view that where lands under water were granted on condition that they be filled in within ten years from the date of the grant, the State could not take advantage of a default as to any lands actually filled in, even though all lands were not filled, and even if the filling was not made until after the ten years had expired. To quote from his opinion: "So long as the State permitted it to be filled in, even after the time mentioned in the deed, perhaps the State is not now in a position to urge that the terms of the patent were not complied with."

The Attorney General in an opinion delivered in 1893 (page 302) expressed a different view and concluded that the entire property granted should be filled in; that occupation and use of a part only of the premises within the time limited is not a compliance in full with the conditions of the grant.

There must be a *bona fide* effort to fill in.⁷⁰

69. 174 A. D. 933; 160 N. Y. Supp. 892.

70. *Post v. Kreischer*, 103 N. Y. 110.

G. DISTINCTIONS.

The distinction between a restriction, reservation and condition may be summarized as follows:

1. A restriction limits the use to which property granted might be put by the patentee whether the fee passes or not.

2. A reservation is a specific right reserved by the State in and by the terms of the letters patent under which lands are granted; or there may be an implied reservation of certain uses and rights in case a power and authority only is given to occupy and use lands.

3. The condition may be imposed that the letters patent will become void if the restriction is not observed by the patentee, or if the patentee fails to perform some act required by the terms of the patent.

H. FORMS NOW IN USE.

"Appendix XIV" contains forms of letters patent now in use.

I. RULES AND REGULATIONS.

Rules and regulations of the Commissioners of the Land Office, governing applications for grants of lands under water, were adopted December 1, 1920, effective February 1, 1921. They are set forth in full in "Appendix XIV" hereof.

Seventh. Effect of Deeds.

Under the statute, a patent may issue only to the owner of the adjacent lands. The owner of adjacent lands therefore has a prior and preferential right which passes as an appurtenance on a conveyance of adjacent lands. It is usual to consider same as adjacent "uplands." If, however, a grant is made of lands under water adjacent to uplands and later another grant is made of lands lying exterior thereto, the term "uplands" does not strictly apply.

"When land under water has been conveyed by the State to the owner of the adjacent uplands, the lands under water so conveyed become appurtenant to the uplands and will

pass by a conveyance of the latter without specific description. The grant from the State must, under the statute, be made to the upland owner who, as such, has the prior right, and, hence, it would seem to be unnecessary when the latter conveys his lot or farm to which the land under water is appurtenant, to describe the land under water separately."⁷¹

When land under water has been conveyed by the State to the owner of the adjacent uplands or the owner of the adjacent lands, whether filled or not, the patentee may convey the whole or part of such lands formerly under water to another. He need not convey any of the adjacent uplands or the adjacent lands or he may convey part thereof.

Eighth. Actions to Vacate Letters Patent.

Section 1957 of the Code of Civil Procedure provides that the Attorney General may maintain an action to vacate or annul letters patent where the patentee or those claiming under him have done or omitted an act in violation of the terms and conditions upon which the letters patent were granted.

It does not appear that this section has been taken advantage of very frequently. There is one reported case in particular, viz., *People v. American Sugar Refining Company*,⁷² decided at Special Term in February, 1917, on a motion for a judgment on the pleadings. The motion was granted and the complaint dismissed.⁷³ The question which was really decided was that the complaint was not in proper form. Eight letters patent were involved and the same lands were affected by more than one grant. A sufficient and proper distinction was not made as between the different grants and the different parcels affected thereby. Notwithstanding, the merits were considered and certain conclusions reached. One of the most important is that a patentee under a commerce grant may erect private manufacturing plants and is not restricted to the erection of docks for public use.

71. *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574, 9.

72. 98 Misc. 703; 163 N. Y. Supp. 456.

73. Affirmed, 182 A. D. 212; 169 N. Y. Supp. 386.

CODE references. See Author's Note and Distribution Table — page xxiv.

A grant of land under water cannot be attacked collaterally but only by an action to vacate the patent.⁷⁴

A patent is valid and effective until vacated.⁷⁵

Ninth. Barge Canal Terminals.

Chapter 746 of the Laws of 1911 makes provision for the construction of terminals to be used in connection with the Barge Canals of this State. The word "terminal" includes lands, docks, bulkheads, piers, slips, basins, harbors, etc. Terminals were provided for in the cities of Buffalo and New York, in particular, on lands under water. The State Engineer, with the approval of the Canal Board, entered upon, took possession of and used several parcels of land under water in the City of New York, mostly in the year 1914. Some of these lands, although formerly under water, had been filled in and it was contended that certain of such lands had been granted by the Legislature or Land Board, either absolutely or on conditions which had been wholly, partly or not performed.

Two parcels were appropriated in 1912, both in Kings County, and considerable litigation resulted. An examination of the decisions is merited in making a study of title to waterfront property in the City of New York.

First Construction Company v. State of New York⁷⁶ involved lands under water in Gowanus Bay. The Appellate Division affirmed on the opinion of Judge Haight, who acted as official referee. Reference is made to the earlier statutes which do not in terms grant any particular piece or parcel of land, but merely give an upland owner the right to construct bulkheads, wharves and piers and to fill in. These do not in terms grant a fee but a property right in the nature of a grant, which the Legislature has the right to recognize and protect. Hence, if the lands are taken, the patentees are entitled to compensation.

The Court of Appeals, in 221 N. Y. 295, modified the decision of the Appellate Division and remitted the matter to the Court

74. *People v. S. P. Co.*, 218 N. Y. 459, 79.

75. *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574, 81.

76. 174 A. D. 560; 156 N. Y. Supp. 911.

of Claims for a new hearing. It held, however, that the rights and privileges granted by the Legislature over lands under water should be protected against destruction without compensation.

A new trial was had in the Court of Claims⁷⁷ and an appeal again taken to the Appellate Division, which affirmed an award by a divided court.⁷⁸

Other lands taken by the State for terminal purposes were involved in *Palmer v. State* (174 A. D. 933, affirmed without opinion, 220 N. Y. 565). Some of the facts involved were again before the court in 180 A. D. 25, which was reversed by the Court of Appeals, 223 N. Y. 150. The relative rights of the State, the city, the proprietor of the upland and the public were discussed and numerous decisions were construed.

Tenth. Chapter 308 of the Laws of 1917.

The appropriation of lands for Barge Canal terminals in New York City, and the examination of title thereto, disclosed the fact that numerous grants of land under water had been made containing conditions which might not have been fulfilled, thereby making such grants subject to revocation. The Legislature of 1917 enacted an amendment to the Public Lands Law, being Section 77, which reads as follows:

Within sixty days after the passage of this act and on or before the tenth day of January in each year thereafter the secretary of state shall examine the records of all grants of land under water for which patents shall have been issued and which patents contain conditions to be complied with within fixed periods of time after the issue of such patents, and make a list of all such grants containing such conditions, the periods for the performance of which have expired, and certify such list with the names of the patentees and the locations of the lands to the state engineer and surveyor. It shall thereupon be the duty of the state engineer and surveyor to cause an investigation to be made without delay for the purpose of ascertaining whether or not compliance

77. 110 Misc. 164; 180 N. Y. Supp. 241.

78. 194 A. D. 608.

with the conditions contained in such grants shall have been had, and he shall report thereon to the attorney-general. It shall be the duty of the attorney-general to begin actions against all such patentees or their successors in interest or assigns for the annulment of all patents the conditions of which shall be found not to have been complied with within the period fixed in such grants for compliance.

Pursuant to the foregoing act, the Secretary of State reported to the State Engineer over 1,200 grants of land under water containing conditions to be complied with within fixed periods of time after the issuance of such patents and which periods had expired. The State Engineer has since investigated a large number of the parcels of land involved and has submitted reports covering same to the Attorney General. The reports made by the State Engineer indicate that in many cases where, under the terms of the patent, the patentee was obligated to fill in and improve lands under water described in a grant, the patentee or his successor in interest has made no improvements or has only partially improved the lands granted.

It thereupon became the duty of the Attorney General to begin actions where conditions have not been complied with, but before doing so it is necessary to secure searches and make examinations of title in order that the proper and all necessary parties are joined as defendants.

The validity and effectiveness of all grants depend in the first instance on:

1. Publication of notice as required by Section 76 of the Public Lands Law. Such publication is necessary to give the Commissioners jurisdiction. If the notice is not published, the issuance of letters patent is an idle ceremony.
2. Grants to the owners of the lands adjacent to the lands under water.

It appears that the county line between the counties of New York and Queens was assumed to be in the center of the East River and that lands on the Queens County side of the East River

were all assumed to be in the county of Queens. The county line between New York and Queens Counties was in fact the low water line on the Queens County side. When applications were made for grants of land on the Queens County side, notices were generally published in Queens County instead of New York County. As notices were not always published in New York County, the county in which the lands applied for if below low water, were actually located, there was a failure to comply with the statutory requirements of publication in the county in which the lands applied for were situated. Such grants were therefore void.⁷⁹

Recent examinations of title have also disclosed the fact that although the applicant was the owner of the adjacent uplands at the time of the application, he sometimes conveyed the uplands before the grant was made to him so that the grant was not in fact made to the upland owner as required by Section 75 of the Public Lands Law.⁸⁰

A. CONFIRMATORY ACTS.

As to all of such grants, the effect of acts of the Legislature ratifying and confirming grants previously made must be given consideration.⁸¹

The following, being Section 12 of the Public Lands Law, is now in effect:

“ Certain patents and grants ratified.— All patents of lands issued before July eleventh, eighteen hundred and eighty-one, pursuant to resolutions of the commissioners of the land office, and sold by them at private sale to purchasers in good faith, purporting to convey the right, title and interest of the people of this state in and to any state lands, except lands under water in the bay or harbor of New York or adjacent thereto, have been ratified and confirmed, to as full an extent as though the same had been sold at public auction, according to law, but not so as to affect any action pending July

79. *People v. Schermerhorn*, 19 Barb. 540.

People v. Page, 39 A. D. 110, 6; 56 N. Y. Supp. 834.

80. *People ex rel. Tracy v. Woodruff*, 54 A. D. 1, 5; 66 N. Y. Supp. 209.

81. Chapter 625, Laws of 1881.

eleventh, eighteen hundred and eighty-one, or to impair, release or discharge any right, claim or interest of any person in and to such lands. All grants made by the commissioners of the land office prior to March twenty-fifth, eighteen hundred and forty-one, of parts of lots for which payments were made and certified in the manner prescribed by law, have been confirmed."

Section 11 of the Public Lands Law confers upon the Commissioners of the Land Office power to confirm a defective grant.

It should be noted that Sections 11 and 12 of the Public Lands Law are part of Article II, which is general in certain particulars and specific in others. Two distinct methods are provided for the sale of State lands — Article III covers the sale of "unappropriated State lands" and Article VI, "lands under water." The publication of notice required of an applicant for a grant of lands under water (Section 76), is not required as to unappropriated lands. Unappropriated lands are sold at public auction. (Section 33.) Lands under water are sold only to the owner of the adjacent lands. (Section 75.) In addition, the ratification of certain patents and grants as provided by Section 12, does not apply to lands under water "in the bay or harbor of New York, or adjacent thereto."

B. ACTIONS THEREUNDER.

The Act of 1917, although making it the duty of the Attorney General to begin actions, made no appropriation to cover cost of securing searches and making examinations of title. The Legislature of 1919 did appropriate a sum for the purpose and a number of actions have been brought for the annulment of patents either for failure to publish notice, or because not made to owners of adjacent lands, or for failure to comply with conditions stated in patents within the time limited therein.

The actions to be brought will affect title to a large number of parcels of land under navigable waters in all parts of the State where grants have been made, in particular lands in the following

named counties: Albany, Rensselaer, Bronx, Kings, Queens, Richmond and Westchester.

In some instances old grants have been surrendered under Section 75-a of the Public Lands Law and new grants applied for. In other cases old grants have been surrendered and no application made for a new grant.

C. FORM OF SURRENDER.

For forms of surrender see "Appendix XV-a" and "Appendix XV-b."

Eleventh. Summary of Rights.

THE FOLLOWING SUMMARIZES THE RIGHTS PERTAINING TO LANDS UNDER THE NAVIGABLE WATERS OF THIS STATE TO THE HIGH WATER LINE THEREOF, AND TO THE WATERS THEREON:

Prior to the origin of the State Government, numerous tracts and parcels of *land* under navigable waters had been *granted* by so-called Colonial grants to

Individuals and
Municipalities, in particular, towns.

Whether the grantees of lands under water also had grants of the adjacent upland or not, their or its ownership was subject to the public rights of navigation on the water and fisheries therein, and possibly other public rights.

The right of navigation was controlled by Parliament.⁸²

The right of fisheries was controlled by Parliament or the municipality in which the land lay.⁸³

The right of bathing did not exist.⁸⁴

The right of passage along the foreshore did not exist except at certain places by "necessity or usage."⁸⁵

Although the King owned the soil absolutely, his ownership of

82. *People v. S. P. Co.*, 218 N. Y. 459, 75.

83. *Rogers v. Jones*, 1 Wend. 237.

Tiffany v. Town of O. B., 209 N. Y. 1, 12.

84. *People v. S. P. Co.*, 218 N. Y. 459, 74.

85. *People v. S. P. Co.*, 218 N. Y. 459, 74.

the water thereon was subject to the control of Parliament. Without action on the part of Parliament these public rights could not be destroyed or interfered with by the King or by his grantee.⁸⁶

Under the common law of England the upland owner had no right without a license, over adjacent lands under navigable waters or the waters thereon not owned by him, except as one of the general public.⁸⁷

As to *ungranted lands* under navigable waters within the *kingdom*:

The Sovereign of Great Britain in his own right was the owner of the soil; he also owned the waters thereon.

The use and control of the waters thereon was vested in Parliament.

After the organization of the State Government (April 20, 1777)⁸⁸ the People of the State succeeded to all of the rights and powers of Parliament which had not been surrendered by it (and by the King), to control the waters on *granted lands*. Such control was exercised through the Legislature and included:

The power to regulate and improve the public rights of navigation (a municipality holding a grant having similar rights)⁸⁹ and

The power to regulate the public rights of fishery (a municipality holding a grant having similar rights).⁹⁰

86. *L. B. P. O. Co. v. Briggs*, 198 N. Y. 287.

People *ex rel.* Palmer v. Travis, 223 N. Y. 150, 63.

Smith v. Odell, 194 A. D. 763.

87. *Town of Brookhaven v. Smith*, 188 N. Y. 74.

88. *Jackson v. White*, 20 Johns. 313.

89. *Tiffany v. Town of O. B.*, 192 A. D. 126; 182 N. Y. Supp. 738.

Sage v. Mayor, 154 N. Y. 61.

90. *Rogers v. Jones*, 1 Wend. 237.

Tiffany v. Town of O. B., 209 N. Y. 1, 12.

The rights granted by Colonial charters were frequently confirmed and *extended* by the Legislature.⁹¹

As to *ungranted lands* under water:

The People of the State became the owners of the soil * and the waters thereon as successors to the King.

The Legislature, representing the People, became vested with the control of the waters thereon as successors to Parliament.⁹²

The principles of the common law of England were incorporated into the law of this State April 19, 1775,⁹³ but the courts of this State have not adopted the common law of England, in the following particulars:

(a) That the upland owner had no right over the adjacent lands under water or the waters thereon not owned by him, except as one of the general public, but have held that he has a right of access between his uplands and the navigable part of the waters in front thereof and to make same available by building a wharf or pier extending into the water, but not so as to interfere with public navigation or prevent the improvement thereof;⁹⁴

(b) That the public had no right of bathing, although such right has been stated to be "doubtful;"⁹⁵

91. Chapter 115, Laws of 1807.

* See NOTE at end of this chapter, page 319.

92. *People v. S. P. Co.*, 218 N. Y. 459, 75.

93. *Town of Brookhaven v. Smith*, 188 N. Y. 74, 93.

94. *Town of Brookhaven v. Smith*, 188 N. Y. 74.

T. I. S. Co. v. Visger, 179 N. Y. 206.

People v. Mould, 37 A. D. 35; 55 N. Y. Supp. 453.

Barnes v. M. R. R. T. Co., 193 N. Y. 378.

Sage v. Mayor, 154 N. Y. 61.

95. *Tiffany v. Town of O. B.*, 192 A. D. 126; 182 N. Y. Supp. 738.

(c) That the public had no right of passage along the ungranted foreshore, but have held that the right exists and cannot unnecessarily be interfered with by the upland owner.⁹⁶

STATE GRANTS.

The power of the Legislature, *by a two-thirds vote*, or of the Commissioners of the Land Office acting by its authority, to

Grant the fee of the soil *not* previously *granted* and

Destroy all public rights

over same and in and to the waters thereon, has been upheld, provided the area is sufficiently limited. This is a question of fact and "largely one of degree."⁹⁷

Such a grant to the upland owner gives him an absolute fee, while if made to another by the Legislature, it is taken subject to the upland owner's right of access to the navigable water and to make same available.

Such a grant by the Legislature to a municipality not the owner of the upland would authorize it to improve navigation and thus destroy the upland owner's right of access without making compensation.⁹⁸

Legislative authority to fill, and to acquire a "fee simple," coupled with the establishment of a bulkhead line, makes a fill within said bulkhead line lawful and amounts to a grant of the land.⁹⁹

The Legislature has also passed acts which authorized a filling by the upland owner, thereby destroying all public rights, but which did not grant the fee of the soil under water. Such a grant of a mere "privilege," *by less than a two-thirds vote*, to fill in or erect improvements, when the privilege has been exer-

96. *Barnes v. M. R. R. T. Co.*, 218 N. Y. 91.

People v. S. P. Co., 218 N. Y. 459, 75.

97. *People v. S. P. Co.*, 218 N. Y. 459, 82.

98. *Sage v. Mayor*, 154 N. Y. 61.

99. *Williams v. Mayor*, 105 N. Y. 419, 30, 32.

cised, has been held, as a necessary incident thereto and in order to secure the enjoyment and fruits of the privilege granted, to make the grantee "the owner" of the filled land. Until the privilege is exercised by filling in, it was termed a "franchise," capable of being forfeited by the State.¹⁰⁰ An ownership which could not be secured directly should not be secured indirectly.

If the legislative authority to fill, use and enjoy is not general, but limited to the erection of a *wharf* or *dock*, it cannot amount to a grant of the land in fee simple for all purposes.

As the upland owner has a common-law right to build a *wharf* to reach the navigable part of the adjacent waters, the establishment of a bulkhead line may make a fill within same lawful and not a nuisance, but it would not amount to a grant of the land or to the right to use the land except for purposes of access,¹ or for purposes of erecting a wharf or dock.²

The Commissioners of the Land Office have made grants to the upland owner by which the fee passed and by which all public rights were destroyed, excepting the right of the People to use such lands for navigation and dockage purposes.

The Commissioners of the Land Office have also granted to the upland owner a right to fill in lands under water and to maintain docks thereon, thereby destroying all public rights, excepting the right of the People to use such lands as public docks, the People retaining the fee ownership of the soil.³

Whether the fee passed to the upland owner or not, if the People, represented by the Legislature or the Commissioners of the Land Office, *reserved* the right to use the lands as *public* docks or to pass over same, or if the grant was made *on condition* that the patentee maintain a dock for the benefit of the People or a right of passage to the People, the patentee acquired no right to maintain

100. *F. C. Co. v. State*, 221 N. Y. 295, 313.

1. *People v. D. & H. Co.*, 213 N. Y. 194.

2. *People v. D. & H. Co.*, 213 N. Y. 194, 9.

3. *Harper v. Williams*, 110 N. Y. 260.

a private manufacturing plant or to exclude the public or unduly interfere with the public right of passage.

The same would be true if the grant was made *on condition* that a *private* dock be maintained. No right would exist to maintain a manufacturing plant.

Whether the *reservation* was made or the *condition* imposed depends upon the language of the grant and the construction thereof by the courts.

A grant may be so expressed as to amount to a *prohibition* to maintain a manufacturing plant.⁴

A grant may be only a *franchise* to do certain things;⁵ or an *easement* to enjoy certain privileges. A naked prohibition in a fee grant is void.⁶

Thus an upland owner may own lands under water adjacent thereto in fee simple absolute. He may fill it in and exclusively use it for any purpose, or he may use the waters thereon as a basin or slip, or he may leave it in a natural condition unless he is obligated to improve it by the terms of his grant. Such a grant must be by a two-thirds vote of the Legislature.

If he does not have a fee title, he may have an exclusive *right*, *privilege* or *franchise* — call it what you will — to fill in and use for a *particular purpose* such as a wharf or dock, or to maintain a pier without filling. He could enjoy the wharf, dock or pier under such a right, privilege or franchise as if he owned the fee, but he could not maintain a private manufacturing plant. Such a right would not be exclusive, if given on condition that the public might use it in common, even on payment of dockage or wharfage.

Such a right may be in the nature of an easement or a perpetual lease, the consideration passing to the State, being

4. Harper v. Williams, 110 N. Y. 260.

5. Smith v. Mayor, 68 N. Y. 552.

Andrus v. N. S. R. Co., 72 A. D. 551; 76 N. Y. Supp. 530.

6. Craig v. Wells, 11 N. Y. 315.

the development of the waterfront as an improvement to navigation and to promote commerce.

Without either a fee title or such a right, he may have a common-law right of access, together with the right to fill and to pass over the filled ground in common with the public. Such a right would not be exclusive. The fill might be removed and natural conditions restored.

RESPECTIVE RIGHTS.

First. Fee Ownership. This may be in:

A. *The sovereign People of the State.*⁷

1. Subject to the common-law uses thereof by such People individually, to be regulated or destroyed by the State Government, directly or by its authority, as follows:

- (a) To navigate the waters;
- (b) To enjoy the right of fisheries;
- (c) To bathe in the waters;
- (d) To pass along, on and over any part of such lands not then actually covered with water, and to bathe and fish from such lands and land a boat thereon or embark in a boat therefrom.

2. Subject to the common-law uses thereof by the upland owner,

- (a) As one of the People, in the manner aforesaid:
- (b) As a means of access between his uplands and the navigable part of such waters lying in front of his uplands and to make same available;
- (c) Also to retain and use any natural accretion.

Thus there are three parties in interest, viz.:

The sovereign People as owner of the fee.

The People individually having easement rights.

The upland owner having easement rights.

7. *People v. S. P. Co.*, 218 N. Y. 459, 81.

The State Government can, directly or by delegated authority, destroy the easement rights of the People individually without any liability; also the easement rights of the upland owner if done in the interest of and to improve navigation. But the State cannot, directly or by delegated authority, use the lands under water or improve the same by erecting structures thereon not necessary to improve navigation, so as to bar the upland owner from using such lands without making compensation to him.

B. *The upland owner absolutely, his easement rights merging in his fee ownership, or*

1. Subject to all or some of the common-law uses thereof by the People individually, as in A. 1.

Thus there may be two parties in interest, viz.:

The upland owner as owner of the fee and easement rights.
The People individually having easement rights.

The upland owner as owner of the fee of lands under water, holding under a grant antedating the origin of the State Government, cannot destroy the easement rights of the People individually to navigate⁸ and possibly to fish, excepting in a limited area.

If the upland owner holds, under a patent from the State, all easement rights of the People individually might have been destroyed thereby if not reserved by the terms of the patent. If not reserved, the upland owner may own the fee absolutely and not subject to any other uses, the area, however, to be limited.

If the land under water and the upland are both owned by a municipality, its ownership may be subject only to the right of the State to improve navigation, unless the Legislature has surrendered that right or recognized the existence thereof exclusively in the municipality under a Colonial grant.

8. Matter of Public Service Commission, 224 N. Y. 211.

C. *An individual other than the upland owner.*

1. Subject to all or some of the common-law uses thereof by the People individually as in A. 1.

2. Subject to the common-law uses thereof by the upland owner as in A. 2.

Thus there are three parties in interest, viz.:

The individual owner of the fee.

The People individually having easement rights.

The upland owner having easement rights.

An individual other than the upland owner, as owner of the fee of lands under water, holding under a grant antedating the origin of the State Government, cannot destroy the easement rights of the People individually to navigate⁹ and possibly to fish excepting in a limited area.

If he holds under a patent from the State, all easement rights of the People individually might have been destroyed thereby if not reserved. If not reserved, he owns the fee subject only to the right of access of the upland owner, and subject to public easements if the area be too large.¹⁰

D. *A municipality such as a county, city, town or village as distinguished from an individual.*

1. Subject to all or some of the common-law uses thereof by the People individually as in A. 1.

2. Subject to the common-law uses thereof by the upland owner as in A. 2.

Thus there are three parties in interest viz.:

9. Matter of Public Service Commission, 224 N. Y. 211.

10. People v. S. P. Co., 218 N. Y. 459, 82.

The municipality as owner of the fee and having power to regulate certain public easement rights.

The People individually having easement rights.

The upland owner having easement rights.

A municipality not owning the upland may own the fee under water in a proprietary sense the same as an individual, and may convey same.

In its governmental capacity it may improve and regulate navigation, regulate the right of fisheries, the right to bathe and of passage, depending of course to some extent on whether it holds under a Colonial or State grant and the terms thereof.¹¹

Whether it holds under a Colonial or State grant, it cannot destroy, impair or impede the enjoyment of the easement rights of access of the upland owner without making compensation, unless it does so in its governmental capacity in the improvement of navigation.¹²

Second. Easement Rights of People Individually.

These rights are specified in A. 1 ([a] to [d] inclusive) and are to be enjoyed in common with the upland owner and in recognition of his right of access specified in A. 2 (b).

They may only be destroyed by the Legislature or the Commissioners of the Land Office or by their authority. The extent to which they may be destroyed is "one of degree."¹³

They may only be regulated in the same way, except that a municipality may regulate navigation, fisheries,¹⁴ bathing and passage without State authority, if it holds under a Colonial grant; or it may act under a State grant or authority.

11. *Smith v. Odell*, 194 A. D. 763.

12. *Sage v. Mayor*, 154 N. Y. 61.

Tiffany v. Town of O. B., 192 A. D. 126; 182 N. Y. Supp. 738.

13. *People v. S. P. Co.*, 218 N. Y. 459, 82.

14. *Smith v. Odell*, 194 A. D. 763.

Third. Easement Rights of Upland Owner.

These rights are specified in A. 2.

The first can only be enjoyed as one of the People and is subject to destruction and regulation as one of the People.

The second can be destroyed, impaired or impeded without liability, only by the State or a municipality in the improvement of navigation.

All rights of navigation and of the State or a municipality to improve same are subject to the superior right of the U. S. Government.¹⁵

A. PRESUMPTION OF TITLE IN STATE.

In *People ex rel. Underhill v. Saxton* (15 A. D. 263; 44 N. Y. Supp. 211; af. 154 N. Y. 748, no opinion) it was held that there is a presumption of title in the State, to lands under tide water. The burden of proving title by a grant or patent — Colonial or State — is therefore cast on the one claiming title under same.

15. See also Weed's Practical Real Estate Law, p. 1228.

See page 311 as to following:

NOTE.—Justice Blackmar in *Bardes v. Herman* (62 Misc. 428) quotes from the opinion of Judge Werner in *Barnes v. Midland R. R. Co.* (193 N. Y. 378), what he, Justice Blackmar, takes to be a deliberate formulation of the law of this State as to the *jus privatum* of the crown in the soil under the waters of the sea and navigable, *i. e.*, tidal waters, to the effect that this right in the crown as distinguished from the *jus publicum* was in this country, from the first settlement of the province, abandoned to the proprietors of the upland, so as to have become a common right, and thus the common law of the State. Justice Blackmar appears to have taken this statement in the *Barnes* case as an assertion that the actual title in fee to the lands under such waters is vested in the riparian owner as a presumption of law, as in cases of inland waters.

The *Barnes* case, in so far as statements to the effect quoted are concerned, followed what was assumed to be a like statement of the law made by Judge Gray in the opinion of the court in *Town of Brookhaven v. Smith*, in 188 N. Y. 74.

A reference to both the Barnes and Brookhaven cases will show that what was there said was *dicta*.

Judge Gray in the Brookhaven case quoted from "Gould on Waters," 3rd Edition, Section 32, when he made reference to this abandonment of the *jus privatum*, and Gould, in the section cited, quoted from Judge Elmer in *Bell v. Gough*, a leading New Jersey case, reported in 23 N. J. L. Rep. 625 (decided in 1852).

Bell v. Gough was the determination of the legal effect of a grant by the Legislature of New Jersey of a parcel of land between high and low water in the Hudson River, at Paulus Hook, in front of upland owned by another person.

This grant was held to be void as in violation of the right of the riparian owner who, it appears, had filled in the foreshore for his own use. Six judges wrote opinions in the case, eight sat and the two, without opinion, concurred in the judgment. Judge Elmer's was the only opinion from which it might be asserted that the riparian owner under the New Jersey doctrine of the law had that *jus privatum* or legal title as part of his riparian rights. The other five judges stated without qualification that title below high water line in the sea and navigable rivers was, from the beginning, vested in the State; that the Legislature could make grants of it to owners of the upland.

In this case it seems to have been established that it had long been the custom for riparian owners to fill in flats between high and low water without grant or license, and that by such usage this filling had become a right when it did not interfere with the *jus publicum*, navigation, etc. But Judge Elmer's opinion was alone in seeming to hold that title extended to the filled land, and in the disposition of the case his statement was clearly *dictum*.

In *Oelser v. Nassau, etc.*, Co. (134 A. D. 281) the court stated that the precise rights of riparian owners have not been determined by our courts. He referred to the construction by Judge Blackmar of the Brookhaven and Barnes cases, in the *Bardes* case—that the riparian owner had title—and stated: "I do not think that the Court of Appeals intended to announce any such doctrine."

No case has been found in this State holding that without a grant from the State a riparian owner has any title below high water line in navigable public waters. His rights according to the authorities are to get to the navigable parts of the waters, but never to obstruct the free passage of the public over the foreshore.

It is incredible that the Court of Appeals in a case like *First Construction Co. v. State* (221 N. Y. 295), and any number of other cases, could overlook the common-law title of riparian owners below high water, as stated by Judge Blackmar, if any such title exists, or was even thought to exist. On the contrary, the theory and custom has always been for the riparian owner to seek a grant for the tide way or land below high water, either from the State as the law provides, or the towns where the towns had title under their charters.

In an article entitled "The Alienability of the State's Title to the Fore-shore," by Royal E. T. Riggs, in 12 *Columbia Law Review*, 395, the author

at page 418 says: "Nothing contained in the Brookhaven, Barnes or Lewis' Point" (198 N. Y. 287) "cases purports to overrule the law enunciated in the Staten Island Ferry, Wetmore or Langdon cases. So far as New York is concerned, therefore, we conclude that the *jus privatum* and *jus publicum* are both merged in the People of the State of New York, who are both trustee and *cestui que trust*; that the power of the State to alienate lands under tide waters to the adjoining owner of the uplands is absolute and uncontrollable."

It should be stated that in this article reference is made to an article by Frederick R. Coudert, in 9 Columbia Law Review, 217, in which a different conclusion is reached, Mr. Coudert thinking that the Brookhaven and Barnes cases destroyed the theory of *jus privatum* in the People, leaving them nothing but the *jus publicum*, and that the title to the foreshore *prima facie* is in the riparian owner.

CHAPTER XXI.

Abandoned Canal Lands.*

First. Generally.

- A. Opinions and Decisions.
- B. Legislative Acts of Abandonment.
 - 1. Chapter 50, Laws of 1909.
 - 2. Chapter 344, Laws of 1909.
 - 3. Chapter 350, Laws of 1910.
 - 4. Chapter 299, Laws of 1916.
 - 5. Chapter 300, Laws of 1916.
- C. Procedure under Chapter 299, Laws 1916.
- D. Direct Legislative Abandonment.
- E. Procedure under Chapter 244, Laws 1909.
 - 1. Chapter 350, Laws of 1910.
 - 2. Chapter 300, Laws of 1916.
- F. Summary.

First. Generally.

As early as the year 1821 the Constitution prohibited the Legislature from selling or disposing of the navigable communications or canals and provided that "the same shall be and remain the property of the State." Later amendments of the Constitution in 1846, 1882 and 1894 were to the same effect.

The present constitutional prohibition against the abandonment and sale of the canals is found in Article VII, Section 8, of the State Constitution.

A distinction may be made between a *canal* and *canal lands*, *i. e.*, there is no prohibition against a sale of a particular parcel of land acquired for canal purposes and not directly required for the operation of the canal.

Notwithstanding the constitutional prohibitions referred to, Chapter 352 of the Laws of 1849, by Section 3 thereof, provided as follows:

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6765.

“§ 3. Whenever the canal board, shall by resolution determine that any lands taken for the purposes of the canal, may be sold beneficially to the state, the commissioners of the land office may sell, grant, and convey the right, title and interest of the state in such lands and the proceeds of such sale shall be credited to the fund appropriated for the construction of the canal for which such lands were taken.”

Later, and by Chapter 267 of the Laws of 1857, the Canal Board was authorized to determine by resolution that any lands taken for the purposes of the canals of this State have been abandoned. In the event of such abandonment, it was made lawful for the Commissioners of the Land Office to convey abandoned canal lands under certain specified restrictions and regulations.

Section 50 of the Public Lands Law reads in part as follows:

“The commissioners of the land office may sell and convey the right, title and interest of the state in and to any real property acquired for canal purposes, which the canal board, by resolution, determine to have been abandoned for such purposes.”

A. OPINIONS AND DECISIONS.

The power conferred by law upon the Canal Board to determine when lands taken for the purposes of the canals had been abandoned and the possibility of a sale thereof by the Commissioners of the Land Office was considered in an opinion rendered by the Attorney General in 1895 (page 349). Reference is made to the constitutional prohibition of 1846, to Chapter 267 of the Laws of 1857 and to Chapter 338 of the Laws of 1894; also, to *People v. Stephens* (13 Hun, page 17), which held that a portion of the canal which “had become utterly useless to the State” might be abandoned and sold. The constitutional prohibition affects “canals while they continue to be canals” and used and operated as such. Reference is also made to *Sweet v. The City of Syracuse* (129 N. Y. 316), opinion by Judge Earl, who decided in effect that the Legislature may authorize the sale of State property once appropriated by the State and used for the canals but no longer required for canal purposes.

Other opinions by the Attorney General to the same effect were rendered in 1900 (page 128) and in 1905 (page 187).

An opinion rendered by the Attorney General in 1909 (page 706) points out a distinction and is to the effect that certain parts of the old Erie Canal could not be abandoned and sold for the reason that the Barge Canal Act provides for the retention of a specified part of the old Erie Canal to be used as a part of the new Barge Canal.

It therefore appears that, notwithstanding the constitutional prohibition, the Canal Board can declare certain canal lands abandoned when authorized so to do by the Legislature, but that such power of abandonment does not exist or may not be exercised without specific legislative authority or in opposition to legislative restriction or prohibition. It is apparently for the Legislature to say directly or for the Legislature to authorize the Canal Board to determine when particular lands are no longer necessary for canal purposes.

The constitutional prohibition is against the sale or lease of a canal in operation or which is to be kept in operation. So long as a canal is kept in operation, it must be operated by the State and not by an individual under deed or lease. The Legislature may create a canal and provide funds directly, or with the approval of the People, for its construction; likewise, it may declare same abandoned or authorize the Canal Board so to do. These conclusions are justified by two opinions reported in *Sweet v. City of Syracuse* (129 N. Y. 316).

B. LEGISLATIVE ACTS OF ABANDONMENT.

1. Chapter 50 of the Laws of 1909 provided generally for the abandonment by the Canal Board of canal lands and the sale thereof under the direction of the Commissioners of the Land Office (see §§ 50 and 30, Public Lands Law).

2. Chapter 244 of the Laws of 1909 provided for the conveyance "to the owner from whom the property * * * was taken," by the Superintendent of Public Works on the approval of

the Canal Board which shall prescribe the terms of such conveyance. (Am. by Chap. 511, Laws of 1915.)

3. Chapter 350 of the Laws of 1910 provided that the Canal Board might "determine whether any lands, taken for the purposes of the canals, may be sold * * * beneficially to the State, and * * * may sell the same * * * and in order to carry any such sale * * * into effect may authorize the Superintendent of Public Works to execute and deliver to the purchaser * * * a quit claim deed of such lands." (Am. by Chap. 430, Laws of 1915 and Chap. 300, Laws of 1916.)

4. Chapter 299 of the Laws of 1916 amended the Public Lands Law (Article IV thereof) and added several sections.¹

It provided specifically for the sale of Erie, Champlain, Oswego, Cayuga and Seneca Canal lands as they might become no longer necessary by reason of the completion of the Barge Canal, which would become a substitute for the old canals, the sale of such lands to be made under the direction of the Commissioners of the Land Office. It may be supplemental to Chapter 50, Laws of 1909, or may supercede Chapter 50, Laws of 1909, and provide a sole method of operation.

5. Chapter 300 of the Laws of 1916 provided for a sale by the Canal Board of lands acquired for canal purposes in order to restore and afford access from unappropriated lands to a public street or waterway. Such conveyances are to be executed by the Superintendent of Public Works.

It thus appears that there are five separate acts under which canal lands may be abandoned and sold.

Under the second, third and fifth acts, referred to, the Commissioners of the Land Office have no jurisdiction. Conveyances are made by the Superintendent of Public Works, following a certificate from the State Engineer that the lands are no longer necessary for canal purposes, with the approval of the Canal Board, and the authorization of the Superintendent of Public Works to convey by resolution of the Canal Board.

1. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 6, p. 6765.

C. PROCEDURE UNDER CHAPTER 299, LAWS OF 1916.

Chapter 299 of the Laws of 1916 is the act under which canal lands, in particular the canals abandoned as a result of the construction of the Barge Canal, are being sold and conveyed by the Commissioners of the Land Office.

On June 13, 1917, the Commissioners of the Land Office adopted rules and regulations governing grants of abandoned canal lands pursuant to Chapter 299 of the Laws of 1916. See copy thereof — "Appendix XVI."

Under Section 54 of the Public Lands Law, a city or incorporated village has a preferential right to acquire title to abandoned canal lands located within such city or village.

A preferential right is also given to the owner of a building located on abandoned canal lands. (§ 55, am. by Chap. 424, Laws of 1919.)

If the preferences mentioned are not exercised, abandoned canal lands shall be sold at public auction. (§ 56.)

A preferential right is also given to railroad companies and the question arises as to which preferential right prevails. Section 18 of the Railroad Law is to the effect that the Commissioners of the Land Office may grant to a railroad corporation land belonging to the State with certain exceptions, for the purposes of its road, or that such corporation "may acquire title thereto by condemnation."²

Section 140 of the Public Lands Law provides that the chapter of which it forms a part shall not limit or modify the provisions of the Railroad Law relating to the acquisition, for railroad purposes, of any lands belonging to the State.

In view of these preferential rights and the enactment of Chapter 299 of the Laws of 1916, the question also arises as to what force and effect can be given to Section 51 of the Public Lands Law, which had its origin in 1857 and which permits the Commissioners of the Land Office to release lands to the person from whom same were acquired without any consideration, if such lands were in the first instance granted to the State without any payment by the

2. See Chapter XXIV hereof.

State. It is to be noted that this section is permissive and not mandatory.

This section was formerly Section 52 of the Public Lands Law and was considered by the Attorney General in his report of 1909 (page 411). It was again considered at page 475 of the same report. It was subsequent to these reports that Chapter 244 of the Laws of 1909 was enacted, which provided a more convenient way of re-conveying canal lands.

Whether the State acquires the fee to lands taken for canal purposes by appropriation or by adverse possession, its title does not revert to the original owners upon the sale thereof, because the State has the right to sell the same or to dispose of such lands in any way that it chooses, regardless of the fact that it made no compensation to anyone for the lands.³

D. DIRECT LEGISLATIVE ABANDONMENT.

As an instance of a direct legislative abandonment of specific canal lands, see Chapters 893 and 894 of the Laws of 1911, which provided that certain canal lands in the county and city of Schenectady, the use of which for canal purposes may be discontinued by reason of the construction of the Barge Canal, may be sold and transferred, in the manner provided by law for the sale of abandoned canal lands, to the city of Schenectady.

E. PROCEDURE UNDER CHAPTER 244, LAWS OF 1909.

§ 5. Whenever any lands now used for canal purposes shall be rendered no longer necessary or useful for such purposes by reason of the improvement hereby directed, the same shall be sold in the manner provided by law for the sale of abandoned canal lands and the net proceeds thereof paid into the State treasury, and so much thereof as shall be necessary shall be applied to the cost of the work hereby directed; but in the event

3. *Rexford v. Knight*, 11 N. Y. 308.

Birdsall v. Cary, 66 Howard, 358.

Eldridge v. City of Binghamton, 120 N. Y. 309.

that any piece or parcel of land, structures or waters, in whole or in part, heretofore taken or which shall hereafter be taken in pursuance of section four of this act, by reason of a change in the alignment of the canal or in the location of its structures or in the methods of progressing the work, or otherwise, shall be found not to be necessary for canal purposes, the State Engineer and Surveyor shall prepare a map covering so much of the lands, structures or waters, so taken, as shall not be needed and shall present the same to the Canal Board, together with a statement as to the reason why the lands, structures or waters covered by said map are rendered unnecessary in connection with the construction or use of the canals, whereupon if the Canal Board shall approve the Superintendent of Public Works shall have authority to execute and deliver, in the name of the People of the State to the owner from whom the property so deemed to be unnecessary for canal purposes was taken, his heirs, successors in interest or assigns, a quit-claim deed covering the said lands, structures or waters. The Canal Board shall prescribe such terms as it deems just, for the execution and delivery of such deed, and the Superintendent of Public Works shall not deliver such deed until such terms have been complied with by such owner, his heirs, successors in interest or assigns. An amended map, distinguishing the lands, structures or water appropriated in any such case from those sought to be given up for canal purposes and returned to the former owner shall be prepared by the State Engineer and Surveyor and filed in the office of the Superintendent of Public Works and a copy thereof shall also be filed in the office of the clerk of the county in which such property or a part of the same shall be located.

The first part of this Section down to the first *semicolon* was Section 5 of Chapter 147 of the Laws of 1903, known as the Barge Canal Act or the Referendum Canal Act of 1903. It relates to lands used for canal purposes prior to the Barge Canal Act, and is declaratory of the law as it then existed except that it provides for the application of the proceeds of sale.

Following the *semicolon*, the lands referred to are those appropriated pursuant to the provisions of the Barge Canal Act.

Reference is also made to Chapter 488 of the Laws of 1915, which makes similar provisions for reconveying lands appropriated for *terminal* purposes. The two acts are identical in form.

So many applications were made for the conveyance of canal lands, by persons from whom same were appropriated or persons claiming to be their "heirs, successors in interest or assigns," that a plan of procedure and forms were prepared and adopted by the Canal Board, January 21, 1916. The plan and procedure follows. See "Appendix XVII."

The question has arisen as to whether the former owner, even though fully paid for his land, still has a preferential property right or a personal privilege; whether it is such a right as will pass under a deed without specific assignment or a privilege which can only be assigned and which does not pass under a deed.

The parcels appropriated by the State were generally parts of farms or lots and it was evidently the intention of the Legislature not to provide for a sale of such parcels promiscuously and permit independent and embarrassing ownerships. If the lands could be abandoned and sold, they could be sold to anyone. If they could not be legally sold, the legal objection was not removed by limiting a sale to the former owner. A method of abandoning and selling canal lands had existed for years and was retained by Chapter 50 of the Laws of the same year — 1909. The sale required action by the Commissioners of the Land Office and permitted a sale to anyone. The Legislature evidently intended to limit the sale of these particular lands to the former owner, who generally owned the adjoining lands.

The former owner in conveying adjoining lands has frequently included lands appropriated and sometimes conveyed only lands appropriated. As title had already vested in the State, and as the courts have held that not even a right to a claim or award will pass under such a deed,⁴ the deed must pass the right of the former owner to a re-conveyance or have no effect. The former owner

4. Matter of Leist, 189 A. D. 155.

would probably be estopped from claiming that such a deed did not transfer his right to a re-conveyance.

The Attorney General considered the subject in 1913. His opinion (page 456) is to the effect that a quit-claim deed by a former owner of lands appropriated by the State for Barge Canal purposes will give to the grantee in such deed the right to a conveyance and that the Canal Board is authorized to provide for the conveyance of such lands to the grantee.

Ketcham v. Deutsch (211 N. Y. 85, 8) also seems to support the same conclusion. "A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass the less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom."

Although the right of the former owner to a re-conveyance could hardly be termed an "estate," it is in the nature of an "interest" and may have value.

In 1915 the Attorney General expressed the opinion (page 47) that the State cannot compel the owner of lands from whom same have been appropriated for Barge Canal purposes to accept a conveyance of the lands appropriated. This opinion was confirmed in effect by a later decision of the Court of Appeals in *Kahlen v. State* (223 N. Y. 383).

1. *Chapter 350, Laws of 1910.*

The procedure under Chapter 350 of the Laws of 1910, which is Subdivision 3 of Section 15 of the Canal Law, is much like that under Chapter 244 of the Laws of 1909. Provision is made by this act not only for the sale of canal lands but also the exchange "for other lands." There is no limit that the conveyance shall be made to a former owner. The Canal Board and Superintendent of Public Works are given the same jurisdiction and power as the Commissioners of the Land Office.

The right to exchange for other lands is peculiar to this act. It has been held that a power to sell lands did not confer a power to exchange lands and that if an exchange should be made, there

would be a flaw in the title which would not be cured by "mere lapse of time."⁵

2. Chapter 300, Laws of 1916.

A similar procedure may be followed under Chapter 300 of the Laws of 1916, which is Subdivision 11 of Section 15 of the Canal Law. It is to be noted, however, that the right or interest in lands to be conveyed is to be conveyed to the owner of lands *not appropriated*. The purpose of this act is to afford a right of access to unappropriated lands over lands appropriated and in diminution of damages. The Legislature has the power to make such a right of access available, and the owner to whom a deed is tendered cannot refuse same and insist on a full measure of damages.

The Legislature has even provided that *benefits* resulting from an appropriation may be considered. The Revised Statutes in force in 1833 provided that when lands were appropriated by the Canal Commissioners to the use of the public, it should be the duty of the Canal Appraisers to make a just and equitable estimate and appraisal of the damages and benefits resulting to the persons interested in the premises appropriated, from the construction of the work, for the purpose of making which such premises shall have been taken. It was held in *Eldridge v. City of Binghamton* (120 N. Y. 309) that benefits may be set off not only against damages to lands not appropriated, "but also against the value of the part taken."

F. SUMMARY.

Sale of Canal Lands.

A. Prior to the adoption of the Barge Canal Act of 1903:

1st. The Canal Board could determine whether any lands taken for the purposes of the canals have been abandoned. (See Section 15, Subdivision 4, Canal Law.)

2nd. The Commissioners of the Land Office could sell and convey any canal lands so abandoned. (See Section 50 of

5. *Trimboli v. Kinkel*, 226 N. Y. 147.

the Public Lands Law before amended by Chapter 299 of the Laws of 1916.)

Section 5 of Chapter 147 of the Laws of 1903 continued the above procedure and provided for the use of the proceeds of sale.

The so-called "Walters Law" (Chapter 299 of the Laws of 1916) provided a new method of sale of canal lands rendered useless for canal purposes by reason of the construction of the improved canals under the following laws:

Chapter 147, Laws of 1903 (Erie, Champlain and Oswego Canals).

Chapter 391, Laws of 1909 (Cayuga and Seneca Canals).

Chapter 746, Laws of 1911 (Terminals).

The present procedure with respect to abandonment and sale affects two classes of canal lands not acquired under one of these three acts:

(a) Those which might be abandoned but for which the improved canal *was not* a substitute.

(b) Those which might be abandoned for which the improved canal *was* a substitute.

The "Walters Law" applies only to the latter — not to the former.

B. If any lands were acquired for canal purposes since 1903, but not under one of the three acts above enumerated, they might be abandoned and sold as they could have been abandoned and sold prior to 1903.

If any lands were acquired for canal purposes since 1903 under one of the three acts above enumerated, the so-called "Walters Law" does not apply but the following may apply:

1st. They may be abandoned by the Canal Board under Subdivision 4 of Section 15 of the Canal Law, and sold by the Commissioners of the Land Office under the general powers

contained in the first part of Section 50 of the Public Lands Law; or

2nd. They may, in a proper case but not as a general rule, be sold as provided by Chapter 350 of the Laws of 1910, as amended, now Subdivision 3 of Section 15 of the Canal Law; (this also applies to (a) above); or

3rd. They may be sold as provided by Chapter 244 of the Laws of 1909, as amended.

CHAPTER XXII.

Surplus Water and Water Power.*

The subjects of surplus waters, waste waters and water power, and the manner in which an individual acquires title thereto, was incidentally discussed in Chapter IX, Fifth. The right of the individual to acquire title to surplus waters and water power, and the method of acquisition, is dependent upon the power of State officials to grant title thereto or the right to use same. It was particularly pointed out that, although a stream or lake may be navigable or used for canal purposes, all of the water in the stream or lake may not be required for navigation or canal purposes. These may be termed surplus waters.

Waters may also be discharged from a canal in the operation of the canal and as a result of such operation. These may be termed waste waters.

Either surplus waters or waste waters may create water power. Water power may also exist independently.

The procedure under which surplus waters, waste waters and water power may be secured and utilized by an individual was outlined, reference being made to the statutes governing same.

Further reference is made to specific grants and the rights to use the waters granted, as well as waters and water power not specifically granted.

In the year 1903, an opinion was requested of the Attorney General as to whether the State had such broad rights that it could grant the city of Auburn a right to use waters of Owasco Lake for public purposes. The Attorney General responded in an opinion (p. 294) that the waters of Owasco Lake were appropriated for canal purposes under and by virtue of the general acts authorizing the construction of the canals and empowering the

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 1, p. 1175.

Canal Commissioners to appropriate all waters needed for the uses of the canal; that, in addition thereto, by Chapter 524 of the Laws of 1857, provision was made for the building of a dam across the outlet of Owasco Lake and the raising of the water in the lake; that the State could grant to the city of Auburn the right to use water from Owasco Lake for public purposes; that the Canal Board could lease to the city of Auburn the right to use such surplus waters, subject to the rights of riparian owners.

The right to the use of the waters of the Oswego River have been a source of much litigation. An opinion, rendered in 1914 by Judge Haight, formerly Judge of the Court of Appeals, acting as an official referee, is reported in 2 State Dep. Rep., page 356, in *Pratt v. the State*. The navigability of the Oswego River is fully discussed, as well as the utilization of the river for purposes of navigation and water power development from the year 1654 to the present time. The law relative to the disposition and use of waters by the State, as well as individuals, affecting tide waters, other navigable waters and small streams was reviewed.

There was involved not only the river bed and the water flowing therein and title to and right to use same, but also a paralleling canal, dam and dam sites, rapids and rifts. Judge Haight stated in part:

“The upland owners on either side of the river, having become vested with the title of the lands in the bed of the river, were entitled to enjoy all the riparian rights as such owners with the exception of the right which the State had taken for canal purposes, which at this place consisted in the maintaining of a pool between Fulton and the Battle Island rapids, of sufficient depth to float canal boats and also to supply the guard lock located at the rapids within the canal passing outside of the river and along the banks thereof at that place. These riparian rights included not only the right of access to the waters of the river, the common-law right of fishing, boating, etc., but also the right to use the waters of the river for domestic, commercial, mechanical and power purposes. Van Buren, as the owner of the mill

site, had the right, in connection with the owner of the opposite shore of the river, to construct and maintain the dam from Starch Factory island with the wing to his own mill, and use one-half of the surplus waters flowing in the river, not required by the State for the operation of the canal."

* * * * *

"The Oswego River * * * is a fresh water river lying wholly within the State of New York in which the common law * * * is, under the provisions of our Constitution, continued in full force and effect. Under the common law the dominion and sovereignty over lands covered by tide waters, within the limits of the State, belong to the State with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interests of the public in the waters, subject always to the paramount right of Congress to control and improve navigation. * * * This rule, however, does not obtain as to the great northern lakes and rivers connecting them, which form the international boundary between the United States and Canada. * * *

"As to those waters, the rule of tide lands and waters apply, and the State becomes the owner of the bed of the stream. * * * The ownership of the State, however, as to the navigable waters in which it owns the bed of the stream, differs from that in which it holds uplands for sale or pre-emption, * * *. * * * it becomes important to keep in mind the distinction that exists between navigable rivers in which the tide ebbs and flows, and navigable inland rivers of fresh water in which the tide does not ebb and flow. In the case of tide-water rivers the bed of the stream belongs in the State in which they are situated, but in inland navigable rivers of fresh water the bed of the river belongs to the upland owner to the center of the stream unless the grant clearly denotes an intention to stop at the edge or margin of the river. But this ownership is subject to the easement therein or a right of passage with boats as a public highway. The proprietors, however, of the upland have the right to use

the water of the river as regards the public in any way not inconsistent with the easement and neither the State nor any person has the right to divert the water or destroy its usefulness for the owner."

He further quotes from Kent's Commentaries:

"The right of sovereignty in public rivers, above the flow of the tide, is the same as in tide waters. They are *juris publicae* except that the proprietors adjoining such rivers own the soil *ad filum aquae*. But grants of land bounded upon rivers or upon the margin of the same or along the same above tide water carry the exclusive right and title of the grantee to the center of the stream, unless the term of the grant clearly denotes the intention to stop at the edge or margin of the river. And the public, in case where the river is navigable for boats and rafts, have an easement therein or a right of passage, subject to the *jus publicum* as a public highway. The proprietors of the adjoining banks have a right to use the land and water of the river as regards the public in any way not inconsistent with the easement and neither the State nor any other individual has a right to divert the stream and render it less useful to the owners of the soil."

"* * * fresh-water rivers to the middle of the stream belonged to the owners of the adjacent banks. If navigable, the right of the owners is subject to the servitude of the public interest for passage or navigation. The owners, however, are entitled to the usufruct of the waters' flow in the river as appertaining to the fee of adjoining banks and for an interruption in the enjoyment of their privilege in that respect, in consequence of public improvements made by the State, are entitled to compensation for damages sustained."

In 1916, the Court of Appeals in *Morehouse v. Woodruff* (218 N. Y. 494), considering the waters of the Oswego River, held that the Varick Canal, situated on the west side of the river, is entitled to half the water of the river after the State's needs for navigation have been supplied.

The rights of the State and the shore owner, relative to the water and power developed thereby, in the Mohawk River, were expressed in *Watervliet Hydraulic Co. v. State*,¹ where it was held that if a riparian owner should erect a dam in the Mohawk River at a point where the title was in the State, the State would not be liable for its removal, if required to make the river available for purposes of navigation, regardless of the length of time of such maintenance and even though the dam might have been maintained for the purposes of supplying a city with water. If the State did not own the bed of the river, the upland owner had the right to build and maintain a dam, for the destruction of which the State would be liable.

It was further held that, without regard to the ownership of the bed of the river, if a rift existed and it was practicable to use waters for power purposes without a dam, if the State destroyed the power which might be obtained thereat, it is responsible to the owner thereof. This would indicate the right to take and divert from the river, at the point where the rift may be located, water for power purposes.

The right to the use of surplus waters and water power may be incidental to the ownership of the lands adjoining a lake or stream. It may also be the subject of acquisition from the State by purchase or lease, if the right does not otherwise exist to use same.

Surplus waters are also created through hydraulic development by the Conservation Commission (Section 400, Conservation Law), and as a result of the formation of union water districts (Section 538, Conservation Law).

The Commission is authorized to acquire necessary lands for the development of hydraulic power of streams.

The Commission may also grant privileges to municipal or private users to use surplus waters of the canals and canalized streams of the State, including diversion rights held by the State on the certificate of the Superintendent of Public Works that

1. 177 A. D. 7; 163 N. Y. Supp. 939.

same are available for hydraulic uses. Such grants shall be subject to the needs of navigation.

The procedure, preliminary to the issuance of such a grant, is set forth in Section 400 of the Conservation Law.

Article IX-A. of the Conservation Law (Section 530-9, inc.) provides for the formation of union water districts by municipalities, the trustees of which may apply to the Conservation Commission for a survey of the water supply of the district with a view of supplying water from central distributing points for each municipality.

The Commission may sell water to water-works companies or others exclusive of municipal corporations.

It thus appears that the Superintendent of Public Works, the Canal Board and the Conservation Commission have jurisdiction over waters and water powers, and that the right to use same may be secured by application to the respective State officials under whose jurisdiction the respective waters have been placed by the Legislature.

CHAPTER XXIII.

Conveyance of Canal Lands.

- First. Railroad Companies.
- Second. Companies Maintaining Wires.
- Third. Pipe Line Companies.
- Fourth. Generally.

Reference is made to Chapter XXI hereof, where, under the heading "Abandoned Canal Lands," is set forth the statutes under which various State boards and officers may authorize the conveyance or may convey canal lands. These acts are of importance to railroad, electric light, power, telegraph, telephone, water, gas and other pipe line companies as well as individuals.

First. Railroad Companies.

If canal lands are outside of the prism of the canal and not necessary in the operation thereof, a railroad company may secure title thereto or an easement therein or a permit to use same. An easement, right or permit to maintain a bridge over a canal prism may also be secured by a railroad company, subject to rules and regulations imposed by the Superintendent of Public Works or Canal Board.

A railroad company may desire to use canal lands or the State may desire lands of a railroad company for canal purposes. The same lands may serve both purposes. The State is directly engaged in maintaining water transportation, while a railroad company — the creature of the State — is engaged in land transportation. The State operates through the Superintendent of Public Works. The railroad company operates under the supervision of the Public Service Commission and Superintendent of Public Works.

The relative rights of the State and a railroad company were considered by the Court of Appeals in *People ex rel. N. Y. C. R. R. Co. v. Walsh* (211 N. Y. 90). The railroad company owned

the fee of lands upon which its roadbed was constructed. This was intersected by the center line of the proposed Barge Canal. The State appropriated a portion of the roadbed of the railroad company for its entire width, as well as lands adjoining same and owned by individuals. The question presented to the court was whether the State could grant to the railroad company the fee title to any of the lands so appropriated or an easement and right to construct a bridge over the canal prism.

In determining the question presented, the court referred to the general provision of the Railroad Law, which gave to the railroad company the power to construct its railroad across any of the canals of the State, subject to the general supervisory power of the Superintendent of Public Works over the use and occupation of canal lands by a railroad company, in so far as may be necessary to preserve the free and perfect use of the canal or to make any repairs, alterations or improvements in the same.

It was held that the railroad company might secure title in fee but not including the canal prism. An agreement to convey the fee of the canal prism would violate the provision of the Constitution, which requires the People of the State to retain the fee simple once acquired.

It was held that the State need not, in the first instance, acquire a fee title, but that it might acquire an easement only. The requirements of the law are satisfied by the taking of such right as will be adequate for the use which necessitates the taking. Public use of lands for both railroad and canal purposes may be conserved and adequately protected by carrying the railroad tracks over the canal. Likewise, a canal may be carried over railroad tracks.

This decision has served as a guide in determining the relative rights of the State and railroad and other companies, and as authority for conveyances of canal lands to such companies.

In a dissenting opinion (p. 106), the conclusion was reached that if lands are not required for canal purposes, they cannot be acquired by the State for the purpose of conveying same to a railroad company "for railroad purposes under the guise of condemnation for the purposes of the canal." The prevailing opinion was to the effect that the lateral strips of land involved were

necessary in order that the roadbed of the railroad might be widened and filled in to reach the elevation of the bridge over the canal — all of which was necessary by reason of the canal construction; that a canal rather than a railroad purpose was involved.

The Barge Canal Terminal Act makes provision for the acquisition of certain lands and the conveyance of same to a railroad company. Referring to the Rochester terminal, it is specifically provided that the State shall acquire from individuals, and convey to the railroad company named, sufficient land to equal the area taken from the company.¹

The right has been challenged by individuals who claim that the railroad company should acquire the land directly; that such individuals are entitled to an award in condemnation proceedings and should not be compelled to seek compensation through the Court of Claims after appropriation by the State.

If no question is raised by the individual, and if he files a claim against the State, the State's right to convey to a railroad company land appropriated by the State, and to give good title to the company, cannot be challenged.

A railroad company may acquire an absolute fee title to certain canal lands.

A railroad company may secure an easement or right of way over the same or other canal lands.

A railroad company may secure less than a fee or an easement, *i. e.*, merely a license or privilege to construct its tracks and operate its cars over canal lands under the supervision and direction of the State authorities.²

When lands of a railroad company, necessary for the operation of its lines, are taken by the State, the company is concerned in having its right to operate restored. The State could have taken only the right to build its canal, leaving the fee in the railroad company. Or the State could have taken the fee subject to the

1. *L. V. R. R. Co. v. Kalb*, 110 Misc. 250; 180 N. Y. Supp. 98; *af. id.* 190 A. D. 967; 179 N. Y. Supp. 932.

2. *McCarty v. N. Y. C. R. R. Co.*, 73 A. D. 34; 76 N. Y. Supp. 321.

company's right of operation. But if the State takes all, then it must restore the right of operation or make compensation for the damage suffered. The practice is to restore the right of operation and pay damages incidental to the interruption. Damages may be fixed by the Court of Claims on the assumption of a re-conveyed right to operate, or damages may be fixed by agreement with the Special Examiner and Appraiser. The right of the State to deposit spoil on railroad land may also be involved as part of the settlement. This may include the right to deposit spoil on the land to be re-conveyed. For form of "Release for deposit of spoil," see "Appendix XVIII."

Canal lands conveyed to a railroad company or others, if previously acquired for Barge Canal purposes, must be shown on an amended map to be made by the State Engineer and filed in the office of the Superintendent of Public Works; a copy shall be filed in the office of the county clerk of the county where the land is located. (Chap. 244, Laws of 1909.)

The formalities attending the execution and delivery of a deed by the Superintendent of Public Works include a record thereof in his office and in the office of the Secretary of State.

In numerous instances, a railroad company was maintaining a bridge over a water way such as a river which was to be canalized, or a canal which was to be enlarged, or over a depression through which the Barge Canal had been located. The ownership of the underlying land might have been in the State requiring no appropriation thereof. The right of the railroad company might have been statutory only or based on a consent or permit from a State official. All that was required was an elevation of the old bridge or the building of a new, higher or longer bridge to meet Barge Canal requirements. The right to maintain the old bridge at the existing elevation might have been the only thing involved. This *right* was required by the State and taken. A new *right* was not always granted by deed, even though a new bridge was constructed.

Second. Companies Maintaining Wires.

Under this heading may be classed electric light, power, telegraph and telephone companies — those maintaining towers, poles,

cables and wires. In general, these companies own only an easement or right to build and maintain lines. When such lines or right of way, in case a line had not been built, were intersected by the Barge Canal, the companies were interested in securing grants from the State to close the break created by the appropriation. Various situations were found to exist and these situations exist generally to-day.

Where there was no canal before, it frequently appeared that the company had no written right to maintain its lines as located. Sometimes there was a claimed oral permission, or a writing amounting to little more than a letter of permission. If the grant was more formal, it was not often recorded or entitled to be recorded. The appropriation by the State of the undelying fee frequently acted as a cancellation of the license.³ A company was entitled to a grant from the State only if it had a grant prior to the appropriation. It was entitled to be placed in the same legal position as it was in before the appropriation.

Many lines were and are constructed in streets and highways with no grant from the owners of the underlying fee. It was held in *N. Y. Tel. Co. v. State*,⁴ that the telephone company derived its right to erect poles and string wires in a highway directly from the State under Section 102 of the Transportation Corporation Law. The State appropriated the lands within a highway upon which the line was located, necessitating a relocation of the line. This involved the right of the company to ask the State to furnish a new right of way — if possible, over canal land. The rights of telephone and telegraph companies in streets and highways or across public lands and waters were discussed at length in city of *Des Moines v. Iowa Telephone Co.* (162 N. W. Rep. 323).

Lines have been constructed over rivers and old canals and upon old canal lands, sometimes under a special permit and in other instances without any grant or permit from the State. In

3. *Matter of Trustees of Village of White Plains*, 124 A. D. 1; 108 N. Y. Supp. 596.

Munter v. Kobre, 107 Misc. 261; 177 N. Y. Supp. 393.

Taylor v. Millard, 118 N. Y. 244.

Contra, *City of N. Y. v. N. Y. & S. B. F. & S. T. Co.*, 231 N. Y. 18.

4. 169 A. D. 310; 154 N. Y. Supp. 1059; *af.* 218 N. Y. 738, no opinion.

the construction of the new canals it has been found necessary to cause the removal or a change in location or elevation of such lines. New grants might be given for old grants; new permits might be issued for old permits. Such permits are generally revocable. The form adopted in making a new grant or permit provides for a construction and maintenance of the line so as not to obstruct passage beneath the wires and cables and so as not to interfere with the use of the land for canal purposes as required by the Superintendent of Public Works. To illustrate:

The following form was prepared to be used in conveying a right over lands shown on State Engineer's map number 2975:

"Map of a portion of lands formerly appropriated by the State of New York under Parcels Nos., in accordance with Chapter 147, Laws of 1903, as amended, in and out of which there is to be sold, released and conveyed to the Company, its successors and assigns, pursuant to Chapter 244, Laws of 1909, as amended, a permanent right of way and easement to construct, reconstruct, operate, maintain and repair its lines of telephone and telegraph, including the necessary poles, wires, cables, structures, devices and fixtures, with the right to string or install from time to time additional wires and cables, and to permit the attachment or installation of the wires and cables of any other company; and with the further right to trim any trees along said lines necessary to keep all wires and cables cleared four (4) feet, over all those tracts or parcels of land situate, lying and being in the village of, county of, State of New York, located between two parallel lines, each of which is 8'-3" from a center line described as follows:

DESCRIPTION.

* * * * *

"This release and easement is subject at all times to the conditions that all such wires, cables, or other devices crossing the Barge Canal shall be erected and maintained at such an elevation as will give a clearance of not less than forty (40) feet between the maximum navigable elevation of the water

surface in the vicinity of the place of crossing and the lowest wire or cable at a temperature of 70° Fahrenheit, except as may be modified by the Superintendent of Public Works where wires or cables cross on or immediately adjacent to bridges. And further conditioned that all such poles, wires, cables, devices and contrivances not affected by the clearance requirements above mentioned shall be erected and maintained in accordance with the recognized standard practice of telephone and telegraph companies so that there will be no unnecessary obstruction to the passage beneath the wires or cables or to the use of the ground by the owners."

Third. Pipe Line Companies.

Pipe lines were and are being maintained through private lands; under, along and across streets and highways; under and across rivers and canals. Sometimes grants were secured by those laying such pipes, sometimes permits; in other instances pipes were so placed by statutory authority or by no right whatever. Water, gas and other pipe lines are involved. Some of these lines have been incidentally appropriated in the appropriation of the underlying fee. Others have been specifically appropriated. Again, pipes have been removed on the direction of the State Engineer. New rights are then sought and grants and permits may be issued as in the case of companies maintaining overhead wires.

Fourth. Generally.

An easement may be granted to a pipe line company to lay and maintain pipes through canal lands; a similar right may be granted to string wires overhead; the State may retain the fee or convey it to a railroad company. There is now machinery for granting any rights required by these public service corporations in their efforts to serve the public and at the same time preserve the free and uninterrupted use and control of the canals by the Superintendent of Public Works.

The distinction between an easement and a revocable permit is important. A grant of the former gives a vested right the interfer-

ence with which would result in a claim for compensation. A revocable permit may be revoked without liability.

An easement may be granted for a fee or easement taken. Only a revocable permit should be issued where a fee or easement was not appropriated. Nothing more can be granted as affecting the prism of the canal. Outlying canal lands may be granted in fee.

CHAPTER XXIV.

Condemnation.*

- First. Generally.
 Second. Cannot Condemn State Land.
 Third. Express or Implied Authority.

First. Generally.

In considering how an individual acquires title, it is not the purpose to limit the word "individual" to a person. The purpose is to consider "The State of New York" † or "The People of the State of New York" on the one hand and a person or a corporation on the other hand. Corporations, municipal or otherwise, are but creatures of the government. They may take and hold property like a person and may, if a public corporation, be given the power of eminent domain and may exercise it against another corporation or a person.

The question has arisen as to whether any corporation may condemn State owned land. Both railroad corporations and municipalities have sought to exercise the right of eminent domain as against the State.

There has been some confusion in the use of terms. When the State takes, it is regarded as an *appropriation* unless the State acts under a condemnation law. When a creature of the State — a corporation — takes, it is a *condemnation*.

Lands owned by a person are "private" lands.

Lands owned by a corporation may be "private" and held in a proprietary sense or "public" and held for public use.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 5, p. 202; Bk. 3, p. 197; Bk. 22, p. 593; Bk. 26, p. 1125.

See generally, Nichols on Eminent Domain, 2d Ed.

Weed's Practical Real Estate Law, p. 195.

† Phelps v. People, 72 N. Y. 334, 63.

Lands owned by the State are regarded as "public" but may not be subject to the use of the public generally.

Lands owned by a public service or a municipal corporation and held for "public" purposes may be subject to governmental regulation.

Any lands may be appropriated by the State under a proper statutory provision unless there is a Federal or State constitutional limitation.

"All private titles are subject to be affected by this supreme power of the State, and unless the parties voluntarily agree, the statute steps in and makes an agreement between the owner and the corporation and enforces its performance. The assent of the owner to the particular transaction is not affirmatively required, but, in theory, the owner assents to this exercise of sovereign power and takes the compensation awarded as a substitute for the land or such interest in it as the law authorizes to be taken."¹

"Private titles" as used must be held to include public lands excepting such as are owned by the State. This would include so-called "public lands" of public service or municipal corporations.

The State, or a corporation authorized so to do, may take private titles as last above defined.

One corporation may take lands from another but may be required to show that greater public necessity justifies the taking.²

Second. Cannot Condemn State Land.

Title to State owned lands cannot be acquired by condemnation. No municipality, or other creature of the State, can exercise the right of eminent domain as against the State. There must always be a sovereign power. This power might be delegated to one to be exercised against another but it cannot be exercised against the creator — the sovereign — the State. As was said in *Smith v.*

1. *Vandermulen v. Vandermulen*, 108 N. Y. 195.

2. See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 13, p. 491; Bk. 22, p. 956; Bk. 26, p. 713; Bk. 29, p. 697; Bk. 14, p. 423.

City of Rochester (92 N. Y. 463, 77), the "right of eminent domain always and from necessity resides in the sovereign."

A later expression of the Court of Appeals may be found in *People v. A. R. Co.* (160 N. Y. 225, 37):

"The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation."

Assume that the rule were otherwise. If so, the creature could condemn State land to-day and the State could appropriate it to-morrow. The creature could again condemn and the State again appropriate. There would be no superior, controlling and permanent right and the power of eminent domain would be made a mere football. As between creatures of the State, the rule of greater public necessity must control. As between the creature and the State, the State must control — the State must always be sovereign.

The State, through the Legislature, may consent to be sued. This is elementary law.³

But to exercise the right of eminent domain against the State is a different matter. In consenting to be sued the State agrees to be liable as an individual might be liable if an individual does damage to another. The State simply acknowledges a debt or obligation growing out of its activities in building or operating public works or resulting from other State undertakings.

Article I, Section 7, of the State Constitution refers only to the taking of "private property."

Third. Express or Implied Authority.

If, however, it should be held that State lands may be condemned, the right must be expressly conferred and *not merely implied*. It must be found in some specific statute.⁴

The taking of *private* property is authorized if the authority is expressed or necessarily implied. The implied authority could not extend to the taking of State lands although it might extend to *public* property not owned by the State.

3. *S. L. & T. Co. v. Roberts*, 195 N. Y. 303, 20.

4. See *S. L. & T. Co. v. Roberts*, 195 N. Y. 303, 20.

There is authority for the rule that a statute may bind the State if the State is expressly named in the statute or included by necessary implication. It was a principle of the common law and has been recognized in this and other States. But does the rule extend to a statute which attempts by express words or by necessary implication to confer the right to condemn State land? It might be argued that it does under a decision entitled *Matter of City of Utica* (73 Hun, 256). It was contended by the People:

1. That "the City of Utica possessed no right or power to condemn the property of the State,

2. "Especially such as was already dedicated to a public use."

The court stated:

"At the commencement of this investigation we are met with the question whether the statute under which this proceeding was instituted has any application to, or authorizes the condemnation of, the lands of the State. It seems to have been a well-established principle of the common law that the Crown was not bound by a statute, unless named in it, for the reason that the law is presumed to be made for subjects only, and that at all events the Crown was not reached except by express words, or by necessary implication in any case where it would be ousted of an existing prerogative or interest. * * * The United States courts also hold that the sovereign power is not bound by general words in a statute, but only when included expressly or by necessary implication. * * * The same rule has been recognized in many of the States as applicable to the Commonwealth, its rights and interests."

"It is said to be upon this principle that the grant to a corporation by the Legislature of a general power to take real estate for the purposes of the incorporation does not extend to property already dedicated by authority of law to, and held for, another public use * * *, but be that as it may, the rule seems to be firmly established that to take property already appropriated to another public use, the act of the Legislature must show the intent to do so by clear and express terms or by necessary implication, leaving no doubt or uncertainty respecting the intent."

Following the citation of numerous authorities, the court further stated:

“By these authorities two rules are established:

“(1) That the State or People are not bound by a statute, unless expressly named or included in it by necessary implication;

“(2) That where the Legislature has conferred upon a corporation or municipality the general power to acquire lands by the right of eminent domain, it does not apply to lands already dedicated by authority of law to a public use, unless such right is expressly conferred by the statute in direct terms or by necessary implication.”

* * * “We are clearly of the opinion that the city of Utica acquired no right or authority under its charter to condemn the lands in question.”

The court did not hold that the city *could* not acquire authority to condemn, but that such authority had not been conferred. If the State could not have conferred authority, the decision might have and properly could have been made on that ground. In fact, that might have been the only ground on which the decision was justified.

The Commissioners of the Land Office are given power and authority to grant State lands, including lands under navigable and other waters.⁵

The Commissioners of the Land Office derive their power to make grants from the Legislature. It is not an exclusive power and may be taken away by the Legislature. Notwithstanding the power so delegated, it may be and occasionally is exercised directly by the Legislature. There is, therefore, no necessity for granting a power of eminent domain to take State lands, assuming that such power could be given.

Any asserted power by a subject over property of the sovereign State must be strictly construed.

5. See *Matter of McClellan*, 146 A. D. 594, 8; 131 N. Y. Supp. 633; *af. 204 N. Y. 677*.

People v. S. P. Co., 218 N. Y. 459, 69.

PART FOUR.

Compensation — How Acquired by Individual.

- Chap. XXV. Generally.
 XXVI. Awards of Court of Claims.
 XXVII. Agreements with Special Examiner and Appraiser.
 XXVIII. Agreements with Superintendent of Public Works.
 XXIX. Agreements with Conservation Commission.
 XXX. Miscellaneous Agreements.

CHAPTER XXV.

Generally.

Where lands and waters, or some right, title or interest in and to same, are required by the State, the person claiming same is relegated to the Court of Claims unless the statute under which they are acquired provides a different method for fixing the value of the property taken. The statute might provide for an acquisition by the State as follows:

1. By appropriation, in which event the Court of Claims would fix the value, or the value may be fixed by agreement;
2. By condemnation under the Condemnation Law, following which the Supreme Court would have jurisdiction and commissioners appointed by it would fix the value;
3. By purchase and conveyance, the value to be fixed by agreement.

As an illustration, attention is directed to Chapter 569 of the Laws of 1916, which provides for a taking of lands by purchase, condemnation or appropriation.

CHAPTER XXVI.

Awards of Court of Claims.

- First. Creation and Jurisdiction of Court.
- Second. Rules and Procedure.
 - A. Generally.
 - B. Guardians ad litem.
 - C. Attorneys — Liens — Adjustments.
 - D. Calendar Practice.
- Third. Character of Claims.
 - A. By Owners.
 - 1. Tenants in Common
 - 2. Tenants by Entirety.
 - 3. Life Tenants.
 - 4. Joint Tenants.
 - 5. Remaindermen.
 - 6. Vendors and Vendees.
 - 7. Executors and Administrators.
 - 8. Trustees.
 - 9. Heirs.
 - 10. Afterborn Child.
 - 11. Adopted Child.
 - 12. Next of Kin.
 - 13. Foreign Corporations.
 - 14. Expired Corporations.
 - 15. Surviving Partners.
 - 16. Dead When Deed Given.
 - 17. Illegally Married.
 - 18. Assignees and Trustees.
 - 19. Judgment Creditors.
 - 20. Receivers.
 - 21. Municipalities.
 - 22. Religious Organizations.
 - 23. Of Land Isolated; also
 - (a) Land Flooded.
 - (b) Timber.
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 - (d) Highways.
 - (e) Private Highways.
 - (f) Land Indefinitely Described.
 - (g) Land Formed by Accretion.
 - (h) Land Adversely Possessed.

- (i) Land Condemned — Reversion.
 - (j) Cemetery Lots.
 - (k) Fixtures.
 - (l) Unmarketable Titles.
 - (m) Percolating Waters.
 - (n) Surface Waters.
 - B. Other Than Owners.
 - 1. Tenants.
 - 2. Mortgagees.
 - 3. Purchasers Under Foreclosure.
 - 4. Lienors.
 - 5. Dower.
 - 6. Creditors.
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 - 8. Corporation Filing Map.
- Fourth. Trials.**
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 - B. Official Acts.
 - C. Calendar Practice.
 - D. Character of Proof.
 - E. Conflicting Claims.
 - 1. Bringing in Parties.
 - F. Judicial Notice.
- Fifth. Values.**
- A. Incumbrances.
 - B. Part Interest.
 - C. Purpose for Which Taken.
 - D. Plans May Have No Value.
 - E. Offsetting Benefits.
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 - G. Lands Under Navigable Waters.
 - H. Timber.
 - I. Railroad Lands.
 - J. Franchise.
 - K. Revocable Franchise or License.
 - L. On Reconveyance.
 - M. Highways and Streets.
 - 1. Fee Ownership.
 - 2. Private Easements.
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 - 4. Generally.
 - N. Change of Grade.
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- Sixth. Awards.**
- A. Generally.
 - 1. Who Entitled to.
 - 2. Searches — Abstracts, etc.
 - 3. Releases.
 - B. When Not Damages.

C. Award is Personal Property.**1. Exception.****D. Pass by Assignment Only.****E. Subject to Easements.****F. Part Interests.****G. Interest on.****H. Taxes Not to Be Added.****I. Disbursements Allowed.****J. Deposit of.****1. Bond in Lieu of.****K. Order for Judgment.****Seventh. Title Objections.****A. Ownership.****1. Purchase by Guardian et al. Void.****2. Void Foreclosure.****3. Sale of Decedent's Property.****4. Person Out of Possession.****5. Person in Possession.****6. Mortgagee in Possession.****7. Actual or Constructive Possession.****8. Rights of Unborn.****9. By One Without Power to Take and Convey.****B. Adverse Possession.****1. Generally.****2. As Between Tenants in Common.****3. By Life Tenant.****4. Occupation by Sufferance.****5. Against Municipality.****6. Payment of Taxes.****7. Boundary Lines and Fences.****8. Driveway in Common.****9. Easements by Prescription.****(a) Abandonment.****C. Deeds.****1. Delivery to Third Person.****2. By Infants.****(a) By Guardian for.****3. Covenant to Build Fences.****4. Reservation, Exception, Condition.****(a) For Third Party Void.****5. Restriction and Prohibition.****6. Power of Attorney.****7. Lost Deed.****D. Wills.****1. Construction of.****2. How Executed.****3. Power of Sale — Trusts.****4. Life Tenant — Remainderman.****(a) Tenant by Curtesy.**

- 5. Vesting of Estates.
- 6. Suspension of Alienation.
- 7. Legacy.
 - (a) Lien of.
 - (b) When Effective.
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- E. Mortgages.
 - 1. Generally.
 - 2. Presumption of Payment.
 - 3. Discharge of Ancient.
 - 4. Possession of.
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 - 6. Lost Bond.
 - 7. Satisfaction or Discharge of.
 - 8. Release — Part of Premises.
 - 9. Release by Trustees.
 - 10. Rights of Mortgagee.
 - 11. Tenants by Entirety.
 - 12. How Affected by Deed.
- F. Lis Pendens.
- G. Husband and Wife.
 - 1. Conveyances Between.
- H. Corporations.
 - 1. Mergers and Consolidations.
 - 2. Mortgages by — After Acquired Property.
 - 3. Dissolved Corporations.
- Eighth. Judgments.
 - A. Amendments of.
 - B. Interest on.
 - C. Payment of.
 - D. Deposit.
 - E. Distribution.

The creation, organization, jurisdiction and powers of the Court of Claims, as well as the procedure therein, is of first importance.

First. Creation and Jurisdiction of Court.

For many years, prior to 1875, there existed Canal Appraisers who passed upon allowances for appropriations of land and certain claims connected with the canals. The Legislature audited and allowed claims of other character.

After the adoption of the Constitution, which went into effect January 1, 1875, the State Board of Audit was created to hear private claims except such as were heard by the Canal Appraisers.

The Board of Claims was created by Chapter 205 of the Laws of 1883, in and by which the Canal Appraisers and the State Board of Audit were abolished. The Board of Claims was given jurisdiction to hear, audit and determine all private claims against the State which shall have accrued within two years.

In 1897 the Board of Claims was abolished and the Court of Claims created with all the powers and jurisdiction of the Board of Claims.¹ This change was brought about by an amendment of the Code of Civil Procedure. Article one of Title III, of Chapter III, was added.

By Chapter 856 of the Laws of 1911, the Court of Claims was abolished and a Board of Claims again created and the duties, powers and jurisdiction of the court transferred to the Board.

By Chapter 1 of the Laws of 1915, the Court of Claims was again re-established. The provisions relative thereto may be found in Sections 263-284 of the Code of Civil Procedure.

The Court of Claims shall consist of three judges, which may be increased to five as provided by Sections 263 and 282 of the Code. Jurisdiction of the present Court of Claims is set forth in Section 264 of the Code.

The history of the Board and Court of Claims relative to the creation and jurisdiction thereof was considered by Judge Rodenbeck, judge of the Court of Claims, as it existed in 1910, and may be found reported in *Moroney v. State*.² He held that the Court of Claims, "being a statutory court, has only such powers as are conferred upon it by the statute creating it and which come within the authority of the Legislature to enact, and that it cannot pass upon any disputes between citizens which under the Constitution are triable in the ordinary constitutional courts;" that "the Legislature has no power to create a court wherein suitors are compelled to try issues without consent which they have a constitutional right to try in the regular courts, and there is nothing in

1. Chapter 36, Laws of 1897.

2. 67 Misc. 58; 124 N. Y. Supp. 824.

CODE references. See Author's Note and Distribution Table — page xxiv.

the act creating the Court of Claims which indicates an intention on the part of the Legislature to compel suitors to try issues between them in that court.

"The Court of Claims was created to try claims against the State; and, if the Legislature has given it broader jurisdiction, it was undoubtedly the intention that this jurisdiction should be exercised only in cases where the parties consented to submit their issues to the Court of Claims rather than to a court to which they had a constitutional right to apply."

The history of these statutes together with an analysis and construction thereof may also be found in *People ex rel. Swift v. Luce* (204 N. Y. 478 [1912]). The *general* powers and jurisdiction of the Board and Court of Claims was considered as well as the power to hear, try and determine claims referred to it by the Legislature under *special* laws. The question for determination was whether the Court of Claims "was in reality a court within the constitutional provisions, or only an auditing board and a *quasi-judicial* body." It was decided to be the latter and that "the Legislature was without power to create a new court with State-wide jurisdiction."

In 1910 the State appropriated certain lands for canal purposes. One Smith filed a claim with the Court of Claims, claiming to be the owner of such lands, but an examination of title disclosed a conflicting claim of title. In *People ex rel. Smith v. Sohmer*³ it was held that the Court of Claims, being a statutory court, did not have jurisdiction to pass upon conflicting titles; that the determination of the Court of Claims did not fix the value of claimant Smith's interest in the lands appropriated, but did "determine the value of a marketable title to such lands."

Although the Court of Claims has no jurisdiction to try a title question and to make a determination as between individuals, unless they consent to such a determination, it has jurisdiction to hear and determine a claim of title between a claimant and the State, with or without a stipulation and consent. This important question was decided by the Court of Appeals in 1918, in *People ex rel. Palmer v. Travis* (223 N. Y. 150). "Where the State claims

3. 163 A. D. 830; 149 N. Y. Supp. 276 (1914); *af. id.* 215 N. Y. 709, no opinion.

title to any lands which under its appropriation map it has assumed to take, this question of title must necessarily be settled before any award can be made. The quantum of the appropriation is the very point at issue." Without such inherent jurisdiction, it could not be conferred by stipulation.

The jurisdiction of the Court of Claims has also been considered by the courts with reference to other than claims involving title to lands taken by the State. *Smith v. State* (227 N. Y. 405) is of particular importance.

Second. Rules and Procedure.

A. GENERALLY.

Section 265 of the Code (§ 14, Court of Claims Act) provides:

"The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and method of procedure before it, vacate or modify judgments and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court. Rules of the board of claims or former court of claims, now in force, shall continue to be the rules of the court of claims until changed by such court."

On November 8, 1916, the Court of Claims adopted rules of practice which were still in effect January 1, 1921. These rules together with forms and certain procedure are set forth in full in "Appendix XIX."

After the appropriation of lands or waters by the State as set forth in Part Two hereof, anyone claiming title to, or some right or interest in same, may file a claim with the Court of Claims. Rule 11 prescribes the form and Rule 12 provides that the claim and twelve copies thereof must be filed in the office of the clerk at Albany.

No answer is required on the part of the State; all allegations of the claim are treated as denied. (Rule 2.)

Claims may be amended. (Rule 1.)

Maps of the property appropriated or affected must be attached to the claim and copies. (Rule 22.)

Claims must be filed within two years from the date of appropriation of lands unless the Legislature has passed an enabling act extending the time for filing same. Unless a claim is filed within the time prescribed by law, the Court of Claims has no jurisdiction. Enabling acts have been passed from time to time and have been considered by the courts.⁴

B. GUARDIAN AD LITEM.

Claims can only be filed by adults. If claimant is not an adult or is not competent, the court or a judge may appoint a guardian *ad litem*. As stated, the practice is the same as in the Supreme Court. (Rule 20 and Section 265, Code.)

Section 472 of the Code provides that the court in which the action is brought, or a judge thereof, may appoint a guardian *ad litem* for an infant, and unless the clerk of the court is appointed no person shall be appointed a guardian *ad litem* unless his written consent, duly acknowledged, is produced to the court or judge making the appointment.

Supreme Court Rule 49 prescribes who might be appointed a guardian *ad litem*.

A guardian *ad litem* may be appointed *nunc pro tunc*, if so appointed before judgment against him; otherwise the judgment is void.⁵ But where the judgment is in favor of an infant the same objection may not apply. In any event, if a claim is filed by an infant in the first instance, a guardian *ad litem* may thereafter be appointed *nunc pro tunc*, before judgment. If the claim is for land appropriated, the examination of title which precedes the judgment would disclose the defect, which could then be remedied.

Section 474 of the Code of Civil Procedure provides that the guardian shall not be permitted to receive money or property of the infant until he has given sufficient security "approved by a judge of the court * * * to account for and apply the same, under the direction of the court."

4. See *Cooper-Snell Co. v. State*, 230 N. Y. 249 and cases cited.

5. *Seiden v. Reimer*, 190 A. D. 713; 180 N. Y. Supp. 345.

CODE references. See Author's Note and Distribution Table — page xxiv.

Section 475 provides that the security must be a bond to the infant in such penalty as the judge directs, not less than twice the sum or the value of the property to be received.

Supreme Court Rule No. 51 provides that the bond must be executed by a surety company or secured by a mortgage on real property.

In general, the Court of Claims, or a judge thereof:

(a) Should appoint a guardian *ad litem* (Code, § 472), having in mind Supreme Court Rule No. 49.

(b) A judge thereof should direct the penalty (Code, § 475).

(c) A judge thereof should approve the security (Code, § 474), having in mind Supreme Court Rule No. 51.

C. ATTORNEYS — LIEN OF — ADJUSTMENTS BY.*

Claims may be filed by a claimant in person or by an attorney, but they must be verified. (Rule 11.)

A claim may not be filed by a corporation as attorney as it is unlawful for a corporation to practice law.⁶

It is also unlawful for an attorney to assist a corporation, domestic or foreign, to practice law.⁷

An attorney of record has a lien upon the claimant's claim but one not an attorney of record has no lien.⁸

The question of an attorney's lien and the protection thereof in directing the payment of a fund was considered in *Carpenter v. N. Y. Trust Co.*⁹

A client may at any time for any reason, however arbitrary,

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 24, p. 407.

6. See Chapter 254, Laws of 1916.

U. S. T. G. Co. v. Brown, 166 A. D. 688; 152 N. Y. Supp. 470; af. 217 N. Y. 628.

7. Matter of Pace, 170 A. D. 818; 156 N. Y. Supp. 641.

8. Weinstein v. Siedman, 173 A. D. 219; 159 N. Y. Supp. 371.

9. 174 A. D. 378; 161 N. Y. Supp. 267; af. 221 N. Y. 719.

CODE references. See Author's Note and Distribution Table — page xxiv.

discharge his attorney and the attorney can recover only the reasonable value of the services rendered to the time of discharge.¹⁰

Such a discharge will not have the effect of annulling a prior assignment to the attorney of a portion of an award, nor deprive him of his lien for services previously rendered. The court should not ignore the claims of such attorneys for professional services and direct the full amount of an award to be paid to the client.¹¹

There is a presumption of authority upon the part of an attorney to represent his client,¹² but an attorney cannot stipulate away property rights without his client's consent. A court of justice will very likely relieve a client from such a stipulation. As was said in *Humphries v. Shapiro* (187 A. D. 96):

“While it is true that in all that properly relates to the conduct of a trial, the attorney represents the party, and is his authorized agent and the attorney's agreement and stipulation, within the boundaries of that authority, is the agreement and stipulation of the client and binds the latter as if he himself had personally made it (*Mark v. City of Buffalo*, 87 N. Y. 188), it is also true that the courts have the power to relieve parties of their stipulations, and orders entered thereon, in proper cases.”

In *Matter of Callahan*,¹³ the court cited *Clinton v. N. Y. C. R. R. Co.*,¹⁴ and stated that:

“It has long been settled that the authority of an attorney extends to the management of the case in all the exigencies which arise during its progress and that, in the absence of

10. *Martin v. Camp*, 219 N. Y. 170.

Matter of City of New York, 219 N. Y. 192.

11. *Matter of Board of Water Supply*, 179 A. D. 877; 167 N. Y. Supp. 531.

12. *Carpenter v. N. Y. T. Co.*, 174 A. D. 378, 83; 161 N. Y. Supp. 267; *af. 221 N. Y. 719*.

13. 106 Misc. 202; 174 N. Y. Supp. 268; *af. 188 A. D. 994*; 175 N. Y. Supp. 896.

14. 147 A. D. 470; 131 N. Y. Supp. 881.

fraud, his authority cannot be questioned by his client because of the want of specific authority to do the act done or consented to."

Also that:

"The authority of the court to relieve a party from a stipulation is an exercise of judicial discretion which may not be invoked without cause shown."

D. CALENDAR PRACTICE.

The calendar practice is covered by the rules of the Court of Claims and also by the Code of Civil Procedure, Section 284 in particular. (Now §§ 18, 19, 24, Court of Claims Act.)

Third. Character of Claims.

Claims may be filed for the appropriation of lands and waters, including, among others, such as are required for the purposes of the canals, highways, Forest Preserve, parks, reservations and public defence.

Claims may be filed by owners, lease holders, tenants, mortgagees, holders of easements, in fact, by all having or claiming some right, title or interest in and to the lands or waters taken. This would include individuals, corporations, railroad, electric, telephone, telegraph and water power companies.

Claims may be founded on a formal appropriation in compliance with a statute, or on a physical entry and actual appropriation or on an incidental appropriation. In either event the right to appropriate must exist in order to create a liability on the part of the State. Unless the Legislature has authorized the appropriation, the State is not liable, but there may be an individual liability on the part of State officials or contractors. So held as to lands used in constructing a State highway, title to which should have been secured by the county.¹⁵

15. *Konner v. State*, 227 N. Y. 478.

Sometimes a formal appropriation is made from the fee owner of lands over which a right of way exists. There may or there may not have been a formal appropriation of the right of way. A claim may be filed by the owner of such right of way in either event, on the theory of a formal appropriation. As was said in *People v. N. Y., O. & W. R. Co.*,¹⁶ speaking of the Barge Canal Act, full compensation is contemplated, "to all parties whose property rights were injured."¹⁷

A. BY OWNERS.

An owner, or one claiming to be such, may always file a claim. If he is not the sole party in interest, it may be necessary to bring in and add to the claim other parties in interest. Provision for so doing is made by Sections 281 and 281-a of the Code of Civil Procedure. Under these sections of the Code, other parties, known or unknown, may be brought in and made parties, or substitutions may be ordered whenever necessary to a complete determination of the controversy or the determination of a liability.

A claim may be filed by one tenant in common or by one of two or more joint tenants, and the others must be brought in unless they release to the claimant of record. This is likewise true as to tenants by the entirety, or tenants for life or years and remaindermen. Owners of easement rights, leases, incumbrances and dower — consummate or inchoate — may be brought in unless they release.

1. *Tenants in Common.**

A tenant in common in the first instance may acquire all the title by adverse possession as against his co-tenant, and become the sole party in interest and file a claim as such.¹⁸ One tenant in common may disseize another but mere possession by one does not

16. 133 A. D. 476; 117 N. Y. Supp. 1048.

17. See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 28, p. 1144.

* See also Weed's Practical Real Estate Law, p. 1114.

18. See *Tarplee v. Sonn*, 109 A. D. 241; 96 N. Y. Supp. 6.

CODE references. See Author's Note and Distribution Table — page xxiv.

amount to an ouster even though long continued. Such a possession for 83 years was not sufficient in *Berger v. Horsfield*.¹⁹

The rights of a tenant in common as against other tenants in common and as against other persons was considered at length in *Commonwealth Water Co. v. Brunner*.²⁰

2. *Tenants by Entirety*.*

A husband may convey land owned by himself to himself and wife and create a tenancy by the entirety the same as under a deed from a third person to himself and wife.²¹

A grant to a husband and wife, without characterizing them as such, makes them tenants of the entirety. A contrary intent may appear from the language of the instrument under which they take and they may hold as tenants in common.²²

As a husband may sell or mortgage his interest in realty so held, which is the right to the use of an undivided half of the estate during the joint lives of himself and wife, and the fee in case he survives her, he has been held to be entitled to institute and maintain a proceeding for damages to lands.²³ He could not file a claim and secure full value of land appropriated by the State for, if he should die first, his wife would be entitled to compensation.

3. *Life Tenants*.

A life tenant might have the right to file and prosecute a claim on behalf of himself and a remainderman. *Rogers v. A. G. & P. Co.* (213 N. Y. 246) gives a scholarly review of the rights of a life tenant as against one committing waste or trespass or as to "land damaged."

19. 188 A. D. 649; 176 N. Y. Supp. 854.

20. 175 A. D. 153; 161 N. Y. Supp. 794.

See also *Wilsey v. Loveland*, 180 A. D. 279; 167 N. Y. Supp. 546.

* See also *Weed's Practical Real Estate Law*, p. 1118.

21. *Matter of Klatzl*, 216 N. Y. 83.

22. *Miner v. Brown*, 133 N. Y. 308.

23. *Matter of Goodrich v. Village of Otego*, 216 N. Y. 112.

4. *Joint Tenants.**

A joint tenancy is created by a conveyance by a wife to her husband of an undivided interest in real estate owned in fee by her, where the intention is expressed that the parties shall hold as joint tenants and not as tenants in common.^{23a}

5. *Remaindermen.*

One filing a claim as a vested remainderman may be *divested* and his claim fall.²⁴

A contingent remainderman may not file a claim.²⁵

6. *Vendors and Vendees.†*

A vendor of real property by contract retains the legal title as security for the debt; the purchaser becomes the equitable owner, may take possession and erect structures. On payment in full, the purchaser is entitled to a conveyance.²⁶

Prior to the enactment of Chapter 502 of the Laws of 1908 (Section 2801-A of the Code of Civil Procedure), if an owner should sell lands by contract and die after making the same, the contract was personal property; the legal title vested in the heirs of the seller as security for the debt. On payment in full by the purchaser, the devisee, heir or grantee of the decedent was obliged to convey to the purchaser.²⁷

Realty is converted into personalty by virtue of a sale, even though the purchase money is not paid. The personal representative of a decedent vender, in realizing for the benefit of the legatee

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 15, p. 145.

Weed's Practical Real Estate Law, p. 1123.

23a. Matter of Horler, 180 A. D. 608; 168 N. Y. Supp. 221.

24. Matter of Steinwender, 176 A. D. 517; 163 N. Y. Supp. 309; af. 221 N. Y. 611.

25. Bryer v. Finnen, 178 A. D. 671; 165 N. Y. Supp. 805.

† See also Weed's Practical Real Estate Law, p. 1208; p. 1204.

26. Thomson v. Smith, 63 N. Y. 301.

27. See Holley v. Hirsch, 135 N. Y. 590.

Williams v. Haddock, 145 N. Y. 144.

CODE references. See Author's Note and Distribution Table — page xxiv.

or next of kin, may be obliged to take back the land as a substitute for the money due and unpaid but this would not result in a re-conversion.²⁸

Section 2697 of the Code of Civil Procedure superseded the Act of 1908 and provided that an executor or administrator of decedent vendor may convey by deed on behalf of the devisee or heir. (Now § 227, Surrogate Court Act.)

It therefore appears that if lands are appropriated after sale by contract, both the vendor and vendee may have an interest in the lands and may file a claim or claims.

If the vendor conveyed subject to the contract, his grantee may have an interest, the conveyance of which could be compelled.

If the grantor has not conveyed or has died, his heirs or devisees, as well as his personal representative, on behalf of next of kin or legatees, may have an interest.

The contract purchaser, or his assignee,²⁹ may have an interest.

If the contract purchaser has died, the one who has succeeded to his equitable rights would have an interest. Such equitable rights, if not disposed of, would pass to the heirs of the purchaser.

7. *Executors and Administrators.*

If the owner of lands appropriated dies before filing a claim, same may be filed by the executor or administrator, who will be treated as an owner. One of two executors or a surviving executor may act.

A claim may be filed by the administrator of one who has disappeared. (See § 2597, Code; § 127, Surrogate Court Act.)

8. *Trustees.**

An executor in trust or a trustee holding title may file a claim, but not an administrator with the will annexed who took no title.

28. See *Bender v. Luckenbach*, 162 Pa. 13.

Rose v. Jessup, 19 Pa. 283.

Leipers Appeal, 35 Pa. 420.

29. *Schuyler v. Kirk-Brown R. Co.*, 193 A. D. 269.

* See also *Weed's Practical Real Estate Law*, p. 1160.

Title may be vested in the Supreme Court, which would have power to appoint some person to execute the trust who could file a claim.³⁰

An executor with naked power to sell real estate is not authorized to maintain an action for lands taken by right of eminent domain. He must, in addition to the power, have a right to the possession of the money for purposes of administration or as trustee under the will.³¹

Although appropriated land may be owned by one of record, a resulting trust may exist so as not to make him the proper party in interest, and the one entitled to file a claim and secure compensation for such land.³²

9. *Heirs.**

An heir of a deceased owner of appropriated lands may file a claim if he is the sole heir and if deceased left no creditors.

10. *After-Born Child.*

Where a testator shall have a child born after the making of a will and shall die leaving such child unprovided for and unmentioned in the will, the child will succeed to such part of the parent's estate as the child would have taken if the parent had died intestate.³³

11. *Adopted Child.*

A child legally adopted after the foster-parent has made a will, which neither provides for nor mentions such adopted child, is entitled to share in the foster-parent's estate, as in the case of an after-born child.³⁴

30. See *Kelsey v. McTigue*, 171 A. D. 877; 157 N. Y. Supp. 730.

31. *Cashman v. Wood*, 6 Hun, 520.

People v. Robinson, 29 Barb. 77.

32. See *Callegari v. Sartori*, 174 A. D. 102; 160 N. Y. Supp. 931.

* See also *Weed's Practical Real Estate Law*, p. 568.

33. *Bourne v. Dorney*, 184 A. D. 476; 171 N. Y. Supp. 264; af. 227 N. Y. 641.

34. *Bourne v. Dorney*, 184 A. D. 476; 171 N. Y. Supp. 264; af. 227 N. Y. 641.

12. *Next of Kin.*

A next of kin may file a claim, if deceased left no creditors and if there is no executor or administrator to file same, although the practice is questionable. The safe practice is for an executor or administrator to file the claim and administer the proceeds of the estate.⁸⁵

13. *Foreign Corporations.**

A foreign corporation owning lands in this State and appropriated by the State may file a claim. The power of a foreign corporation to take and hold real property within the State has been questioned, but in *Lancaster v. A. I. Co.* (140 N. Y. 576, at page 591), Judge Gray stated:

“ It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the State when a foreign corporation was prevented from entering its boundaries to transact any lawful business, which a non-resident natural person might have transacted here. What public policy is invaded, and what public interests are prejudiced, by extending to the foreign corporation, for the transaction of its business, the privileges and protection of the laws of our own State, even when that business involves the acquisition of and dealing in real property? ”

This decision was cited with approval in *P. C. Co. v. McKeever* (183 N. Y. 98).

14. *Expired Corporations.†*

A corporation ceases to exist when the time stated in its certificate of incorporation has expired. The property of the corporation then becomes vested in its directors, as trustees for the owners of the stock of the corporation, subject only to the payment of the

35. *Gerber v. State Bank*, 167 A. D. 263; 152 N. Y. Supp. 698.

Contra, *Conlon v. U. D. S. Bank*, 195 A. D. 509.

* See also *Weed's Practical Real Estate Law*, p. 256-8.

† See also *Weed's Practical Real Estate Law*, p. 263.

claims of the creditors of the corporation. A deceased corporation, that is, one which has legally ceased to exist, may not file a claim for lands taken by the State, but the directors of the corporation, in whom its property is vested as trustees, may file such a claim. The owners of the stock have an equitable interest in the real estate, however.³⁶

15. *Surviving Partners.**

A surviving partner holds title to real property for the benefit of the creditors of the partnership and after satisfying their claims, for himself and the heirs or devisees of the deceased partner. He may convey an equitable title and may file a claim.³⁷

16. *Dead When Deed Is Given.*

A deed to a dead man has been held to be a nullity.³⁸ One claiming under such a grantee could therefore not file a claim. The grantor in the deed could file a claim.

17. *Illegally Married.*

If a man and woman file a claim as husband and wife (or if he file a claim alone), and if they are not legally married, the claim should be filed by both as tenants in common, for such they are.³⁹

18. *Assignees and Trustees.*

An assignee or trustee for the benefit of creditors may file a claim, if the trust was created within twenty-five years. Such a trust ceases after twenty-five years and title reverts to the assignor, his heirs, devisee or assignee, who would be the proper party in

36. *Matter of Friedman*, 177 A. D. 755; 164 N. Y. Supp. 892.

Wilson v. Brown, 107 Misc. 167; 175 N. Y. Supp. 688; *af. 190 A. D. 926*; 179 N. Y. Supp. 958.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 28, p. 269; Bk. 26, p. 544.

Weed's Practical Real Estate Law, p. 828.

37. See 20 Ruling Case Law, 994.

38. *L. S. B. v. Schneider*, 105 Misc. 530.

39. *Bambauer v. Schleider*, 176 A. D. 562; 163 N. Y. Supp. 186.

interest and the one who should file a claim. (See Section 110, Real Property Law.) Such a trust does not descend. If the trustee dies before execution of the trust, it vests in the Supreme Court. (Section 111, Real Property Law.)

Assignees or trustees in bankruptcy may file a claim, if title to lands appropriated is vested in an assignee or trustee. Such title may revert and vest again, by operation of law, in the bankrupt, when the purposes of the bankruptcy have been fully accomplished.⁴⁰

19. *Judgment Creditors.*

A judgment creditor was held not to be an owner in *People v. A. R'y Co.* (160 N. Y. 225, 43). He was held to have only a lien upon real estate — “purely statutory” — and to have “no estate or proprietary interest in the land.”

20. *Receivers.*

Receivers may be vested with title to real property or personal property as provided by Section 2468 of the Code of Civil Procedure. When so vested, they may file a claim.⁴¹

21. *Municipalities.**

A city or other municipality may file a claim for pipes, pavement or other improvements taken or destroyed.

Claims may also be filed for lands taken when owned by a town in private as distinguished from public ownership.⁴²

The distinction between lands privately owned by a municipality and that held in trust for the public was pointed out in *People ex rel. Palmer v. Travis* (223 N. Y. 150, 66), and the cases therein cited, in particular *Darlington v. Mayor* (31 N. Y. 164, 93).

A town has no capacity to sue the State, and the Court of Claims has no jurisdiction to hear a claim by a town unless the

40. *Page v. Waring*, 76 N. Y. 463, 73.

41. *Fawcett v. City of New York*, 112 A. D. 155; 98 N. Y. Supp. 286.

* See also *Weed's Practical Real Estate Law*, p. 792.

42. *Town of Islip v. E. of H. P.*, 224 N. Y. 449.

CODE references. See Author's Note and Distribution Table — page xxiv.

State has consented to be sued and has given the Court of Claims jurisdiction.⁴³

22. *Religious Organizations.*

Religious organizations may hold title to land appropriated and may file a claim on account thereof. The Religious Corporations Law specifies the various church or religious organizations which may take and hold title to real property. Among these are included the United Society of Shakers and the Religious Society of Friends, the trustees of which may hold title for the benefit and use of the members of such societies, according to the constitution or regulations and rules of discipline of such societies.

The constitution of the United Society of Shakers is known as the "Shaker Church Covenant," by which the members consecrated their property to the purposes of the society; the trustees of the society are vested with power to take, hold and convey real property, but no conveyance of real property shall be made without the previous approbation of the ministry and elders. These questions were all considered, as well as the nature of the Shaker Society, in *Feiner v. Reiss*.⁴⁴ The society was held to be not an incorporated one but a voluntary association which had obtained the corporate power to have property held by trustees in perpetual succession. It was held not to be necessary for all the members of the society to join in a deed of real estate; a deed from the trustees is sufficient since the statutes vest the legal title in the trustees.

23. *Owners of Land Isolated, Etc.*

Owners of Lands Isolated.

In the opinion of the Attorney General (1907, p. 340), an owner of land isolated may file a claim for the entire value of the land isolated.

(a) Owners of Lands Flooded.

An owner of land flooded, or appropriated for flooding or flowing purposes, may file a claim.

43. *Town of New Lebanon v. State*, 111 Misc. 310; 181 N. Y. Supp. 322.

44. 98 A. D. 40; 90 N. Y. Supp. 568.

(b) Owner of Timber.

An owner of standing timber on lands appropriated may file an independent claim,⁴⁵

(c) Owner of Ice.*

The owner of the *right* to cut ice formed on water appropriated may file a claim. Unless the contrary appears, the owner of the underlying land has the right to cut the ice although the land is flooded by another.⁴⁶ *Valentino v. Schantz* (216 N. Y. 1) reviews the law in this and other States, and lays down the rule which until 1915 seems to have been unsettled in this State.

(d) Owner of Land in Highways.†

Lands within the boundary of a highway may have value and the owner thereof may file a claim. This is especially true if there are mineral deposits or stone which may be quarried.⁴⁷

An owner of land within and on both sides of a highway has a claim if the State appropriates an easement in the highway for a railroad.⁴⁸

(e) Owner of Private Highways.

Although a highway or street may be used by the public, it may not be a public highway or street; it may be nothing more than a private way. *Matter of Wallace Avenue* (222 N. Y. 139) reviews the leading authorities on the subject of what amounts to a public highway. If a highway is only a private way, the owner of the land embraced within same would be entitled to file a claim for the value of the land in the event such land is taken by the State.

45. *Turner v. State*, 67 A. D. 393; 73 N. Y. Supp. 372.

* See also *Weed's Practical Real Estate Law*, p. 1226.

46. *Matter of Brookfield*, 176 N. Y. 138.

† See also *Weed's Practical Real Estate Law*, p. 1004.

47. *Town of Clarendon v. M. Q. Co.*, 102 A. D. 217; 92 N. Y. Supp. 530.

48. *Spencer v. State*, 194 A. D. 79.

(f) Owner of Land Indefinitely Described.*

One claiming as owner land indefinitely described may have no title and a question might be raised as to his right to file a claim.⁴⁹

(g) Owner of Land Formed by Accretion.

One may claim as owner land formed by accretion and if it is appropriated, may file a claim therefor. This is true if the accretion was natural or the result of the act of another but not if by the wrongful act of the upland owner filling in.⁵⁰

(h) Owner by Adverse Possession.†

One may by adverse possession of lands for twenty years secure a perfect title to the lands.⁵¹ He may file a claim if the lands are appropriated.

So an easement may be acquired by adverse possession or prescription and one may become an owner thereof and may file a claim therefor.⁵²

Title may be acquired by adverse possession by a railroad company as against one not made a party to condemnation proceedings.⁵³

(i) Reversion of Land Condemned.

The owner of reversion of land condemned has something of nominal value only.⁵⁴

(j) Cemetery Lot.

The owner of a cemetery lot has only a privilege or license to make interments so long as the lot remains a cemetery. If it is

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 29, p. 847, for mistake in description.

49. See Chapter XXXVIII, hereof.

50. See *Mulry v. Norton*, 100 N. Y. 424.

Steers v. C. of B., 101 N. Y. 51.

† See also Weed's Practical Real Estate Law, p. 53.

51. *Sherman v. Kane*, 86 N. Y. 57, 65.

52. See *Olin v. Kingsbury*, 181 A. D. 348; 168 N. Y. Supp. 766.

53. *L. I. R. R. Co. v. Mulry*, 212 N. Y. 108.

54. *Vandermulen v. Vandermulen*, 108 N. Y. 195, 202.

appropriated and ceases to be used as a cemetery no claim could be filed for the lot, but could be filed for the privilege or license destroyed.⁵⁵

(k) Fixtures.

Owners of fixtures appropriated may file a claim unless the fixtures are expressly excepted from the appropriation.⁵⁶

(l) Owner of Unmarketable Title.*

Although the title of the claimant may not be marketable and may not be such as to entitle him to a decree of specific performance of a contract for the sale of the premises, yet, if the property is taken by eminent domain, he would be entitled to file a claim and to compensation.⁵⁷

(m) Percolating Waters.

Where the State, in digging on its own lands incident to the construction of a State canal, cuts off percolating waters which are the source of supply of certain wells on adjoining lands, it is not liable. The rule is different if a subterranean stream flowing in a distinct, permanent and well-defined channel is interfered with. Such streams are governed by the same rules as apply to a natural water course flowing on the surface.⁵⁸

(n) Surface Waters.

The rule with reference to surface waters is different from that applying to natural surface streams. No liability arises from the obstruction of surface waters and the State is not liable for obstructing same or for damages resulting from such obstruction.⁵⁹

55. See *Clarke v. Keating*, 183 A. D. 212; 170 N. Y. Supp. 187.

56. *Jackson v. State*, 213 N. Y. 34.

* See also *Weed's Practical Real Estate Law*, p. 715.

57. *Matter of M. R. Co. v. Meighan*, 186 A. D. 733.

58. *Flanigan v. State of N. Y.*, 113 Misc. 91.

59. *Kilts v. State of N. Y.*, 113 Misc. 112.

B. BY OTHER THAN OWNERS.

The term "owner" is used with reference to one owning the fee or an undivided interest therein or one in a representative capacity holding title for the benefit of others. The interests of tenants, mortgagees, holders of dower rights, and others may be involved. Those entitled to such interests may also file independent claims but the respective rights cannot be determined by the Court of Claims without consent. Although not strictly "owners" within the ordinary understanding of that term, they may be such under statutory definitions.⁶⁰

1. *Tenants.**

Tenants may file claims. This includes a lessee whose crops are injured or destroyed by the appropriation of lands for a public improvement. (15 Cyc. 758.)

This right of a tenant has been repeatedly recognized by judges of the Court of Claims and claims have been allowed for the value of the unexpired term of a lease.⁶¹

2. *Mortgagees.*

Mortgagees may have the prior right to any claim growing out of the appropriation of lands by the State, against which a mortgagee has a lien. So held in *Bank of Auburn v. Roberts* (44 N. Y. 192-203). To the same effect see *Matter of Mayor*.⁶² In *Matter of City of New York*,⁶³ it was held that if only part of mortgaged premises are taken, and the value of the part taken is less than the face of the mortgage covering the whole, the mortgagee's interest would be the entire value of the part taken.

If the value of the part not taken is sufficient to satisfy the

60. See Section 3358, Code of Civil Procedure; section 2, Condemnation Law.

* See also *Weed's Practical Real Estate Law*, p. 661.

61. *Baker v. State*, 63 Misc. 549.

Musanti v. State, 73 Misc. 534.

Moroney v. State, 67 Misc. 58; 124 N. Y. Supp. 324.

U. T. Co. v. F. C. Co., 117 A. D. 305; 102 N. Y. Supp. 190.

Spencer v. State, 194 A. D. 79.

62. 116 A. D. 252; 101 N. Y. Supp. 613.

63. 134 A. D. 509; 172 N. Y. Supp. 50.

mortgage, it would seem that the mortgagee might waive his claim to the part taken and retain his lien against the part remaining. This would follow the rule of "inverse order of alienation" laid down in *Hopkins v. Wolley* (81 N. Y. 77) and *Denton v. O. C. N. B.* (77 Hun, 83).

The respective rights of the mortgagee and mortgagor as well as of the condemning party were reviewed in *Matter of Jones*.⁶⁴

3. *Purchasers Under Foreclosure.*

In the event of a void statutory foreclosure of a mortgage, the purchaser at the sale becomes the assignee of the mortgage and each subsequent grantee becomes an assignee thereof.⁶⁵

4. *Lienors.*

Liens may exist under a parol contract of sale, if the purchaser goes into possession and makes improvements. If an appropriation should follow, the one making the improvements might be able to file a claim.⁶⁶

5. *Dower.**

If an owner has died before an appropriation leaving a widow, she would have a vested dower right and be entitled to file a claim on account thereof.

If the owner is living and married, his wife would have an inchoate right of dower, but it is questionable whether she would be entitled to file a claim on account thereof.

It was held in *Moore v. Mayor* (8 N. Y. 110) that where lands were taken for public use, an absolute fee was acquired divested of any inchoate right of dower; that the inchoate right of dower was not a contractual right but one incident to the marriage relation — not an estate but a mere contingent claim.

This case was cited in *People v. A. R. Co.* (160 N. Y. 225, 45).

64. 178 A. D. 654; 165 N. Y. Supp. 896.

65. *Ketcham v. Deutsch*, 211 N. Y. 85.

66. See *Stoddard v. Lewis*, 175 A. D. 749; 162 N. Y. Supp. 493.

* See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 2, p. 312. *Weed's Practical Real Estate Law*, p. 381.

The question of dower right was exhaustively reviewed in *Armstrong v. Union College*,⁶⁷ and was again considered in *Rumsey v. Sullivan*.⁶⁸

An inchoate right of dower is not cut off by a conveyance executed by the husband alone; neither would a contract of sale effect the destruction of the right. But a purchaser of lands by contract has only an equitable interest. His wife may not have an inchoate right of dower.⁶⁹

Lands may be owned by one, subject to an outstanding right of dower in the wife of another. Where a man contracted to sell and convey real property, specific performance was decreed, even though his wife would not sign the deed. An abatement in the purchase price might be made representing her dower interest.⁷⁰

The rights of the wife of the purchaser by contract were considered in several conflicting opinions in *Lugar v. Lugar*.⁷¹

Dower does not attach where the husband takes and holds title as an intermediary, *i. e.*, *in transitu*.

Dower does not attach when lands are owned by husbands as joint tenants.

Dower does not attach unless the husband is in possession or has a present right to possession.⁷²

An antenuptial agreement by which a prospective right of dower and real estate is released may be valid; the validity of such an agreement rests upon the facts of each particular case. When such an agreement is fairly made and executed, without fraud or imposition, it will be enforced by the courts.⁷³

6. Creditors.

It frequently happens that an owner of lands appropriated dies shortly before the appropriation, with or without a will, leaving creditors. The rights of such creditors and the length of

67. 55 A. D. 302; 66 N. Y. Supp. 942.

68. 166 A. D. 246; 150 N. Y. Supp. 287.

69. *Nichols v. Park*, 78 A. D. 95; 79 N. Y. Supp. 547.

70. *Campione v. Eckert*, 110 Misc. 703.

71. 160 A. D. 807; 146 N. Y. Supp. 37.

72. *Durando v. Durando*, 23 N. Y. 331.

73. *Matter of Scott*, 173 A. D. 270; 156 N. Y. Supp. 960.

time within which they may enforce such rights against the lands of decedent becomes very material.

As the law stood in 1872, a debt of a creditor of a decedent became outlawed, at most, in six years after the expiration of eighteen months from the death of a testator. But the creditor could not compel a proceeding for the sale of lands for the payment of debts until an accounting had been rendered by an executor or administrator.⁷⁴

In a case where no letters had been issued although a will had been probated, and where there had been no accounting, the rights of the creditors of a decedent were held not to be cut off even though the decedent had been dead for twenty-eight years.⁷⁵

Adams v. Fassett (149 N. Y. 61) harmonizes those sections of the Code which prohibit the creditor from proceeding in the collection of his debt, and those which set up a statute of limitations against it; held that the period during a statutory prohibition is not a part of the time limited for the commencement of actions.

7. *Legatees.*

Legacies may be a charge against land and if so it was held in *Butler v. Johnson* (111 N. Y. 204) that the legatee must proceed to enforce his claim or be barred by the six-year limitation.

In *Hogan v. Kavanaugh* (138 N. Y. 417) a legatee was held to be entitled to a judgment providing for a sale of lands for the payment of a legacy, subject to the rights of creditors, although twenty-eight years had elapsed since the death of testator. The reason stated was that no letters testamentary or of administration with the will annexed had been applied for in the meantime.

The relative rights of one claiming as legatee and defending as a creditor were considered in *Kimball v. Scribner*.⁷⁶

If a creditor or a legatee has a lien against lands appropriated, he might file a claim on account of such lien. If he does not do so, his rights may be such as to require protection in making an award or on payment for such lands.

74. *Butler v. Johnson*, 111 N. Y. 204.

75. *Hogan v. Kavanaugh*, 138 N. Y. 417.

76. 174 A. D. 845; 161 N. Y. Supp. 511.

8. *Corporation Filing Map.*

A corporation filing a map locating a railroad line over lands afterward appropriated creates no lien as against the State or which the State must respect. Neither does it establish a right against the owner.⁷⁷

Fourth. Trials.***A. GENERALLY.**

Trials in the Court of Claims are conducted as in the Supreme Court. Claimant must prove the allegations contained in the claim, all of which are treated as denied, although the State files no answer. "In no case shall any liability be implied against the State." No award shall be made "except upon * * * legal evidence." (Code, § 264.)

The State cannot be bound by unauthorized stipulations as to material facts to the prejudice of the State.

The courts have frequently held that the State is not estopped by unlawful acts of its agents or officers.⁷⁸

The last two cases cited (reference 78) involved stipulations compromising litigation relative to the title to lands claimed by the People and, also, by an individual. Under the terms of the stipulation, the State was to quit claim a portion of the lands in exchange for a deed to the balance. The court held that the question of title and ownership was one which could be determined only by the courts, in the absence of a decision on the part of the State officials abandoning its claim of title to the lands in question.

No liability can be created by stipulation. Section 1279 of the Code of Civil Procedure does not permit of the submission of a

77. *People v. A. R. Co.*, 160 N. Y. 225.

* See also Chamberlayne on the Modern Law of Evidence.

78. See *W. W. P. Co. v. A. G. & P. Co.*, 160 A. D. 208; 145 N. Y. Supp. 567; *af. 221 N. Y. 42.*

People v. S. C. L. Co., 213 N. Y. 61.

People v. Witherbee, 178 A. D. 368; 164 N. Y. Supp. 915; *af. 228 N. Y. 535.*
CODE references. See Author's Note and Distribution Table — page xxiv.

controversy to the court if a money judgment might result against the State, in a case where the State may not be sued.⁷⁹

Section 270 of the Code authorizes a compromise of claims on account of the canals, but not without the written consent of the Superintendent of Public Works.

B. OFFICIAL ACTS.

The power and authority of officials, boards and departments of the State and the effect of the acts of officers or agents, as well as the effect of knowledge of facts by officials, has been considered by the courts.

The decisions bear upon the power and authority of those representing the State before the Court of Claims.⁸⁰

C. CALENDAR PRACTICE.

The Attorney General represents the State (Section 270, Code) and may notice any claims which appear upon the calendar. (Section 284.)

Rule 9 of the Court of Claims provides that the clerk shall prepare a calendar as directed by Section 284 of the Code.

When a claim is reached for trial by the Court of Claims, if the claimant or his attorney fails to appear, or is not ready to proceed to trial, the court may take proofs and testimony and make an award without any testimony by claimant. Claims may also be dismissed. (Section 284, Code.)

D. CHARACTER OF PROOF.

The claimant should prove ownership of the property appropriated and claimed to be owned by him. As was said by the Court of Appeals in *People v. Travis* (223 N. Y. 150, 67), the claimant "must prove his title as against the State." If no conflicting claims are involved, or if there are no outstanding in-

79. See *M. T. Co. v. Tax Com.*, 220 N. Y. 344.

80. *Matter of City of N. Y.*, 227 N. Y. 119, 31.

Smith v. State, 227 N. Y. 405.

Board of Education v. Todd, 190 A. D. 90; 179 N. Y. Supp. 320.

CODE references. See Author's Note and Distribution Table — page xxiv.

terests such as easement rights, this should be comparatively simple. It should appear that the State has granted the land and that the claimant owns same as against anyone else. A chain of title by conveyances for twenty or more years or adverse possession for a like period may be sufficient but, in general, a period of from fifty to seventy years should be covered, assuming that the State has granted the land and does not own it.

There should be proof of no contract of sale; also whether there are existing leases or easement rights affecting; also as to dower rights. There should be negative as well as positive proof depending upon the facts in each case. If there are no leases, proof to that effect should be made; if there are leases, the particulars regarding same should be shown. Evidence should be offered as to all incumbrances.

The fact that an award has been made against the State for damages done to the property of one person as a result of canal construction, is not evidence and the record of such award in favor of such person may not be used by another person owning other lands similarly situated, unless there is privity between the two claimants in respect to the subject in controversy.⁸¹

E. CONFLICTING CLAIMS.

If there are conflicting claims, different persons claiming the same property or interest in and to such property, both may give proof but their respective rights cannot be determined. Section 268-a of the Code of Civil Procedure makes provision for the deposit of an award so that the Supreme Court may determine the rights of the respective claimants thereto. To this end the Court of Claims *may*, under Section 281 of the Code, and *shall*, under Section 281-a, bring in parties not before the court and make them parties to the claim so that they may be bound by the amount of the award.

1. *Bringing in Parties.*

Parties may be brought in under Section 281 and Section 281-a of the Code by petition to the Court of Claims and order thereon.

81. *Stone v. State*, 138 N. Y. 124.

CODE references. See Author's Note and Distribution Table—page xxiv.

For a form of such petition and order, see "Appendix XX" and "Appendix XXI."

The order may be made by the court or a judge or referee. (Section 281-a, Code; section 21, Court of Claims Act.)

In securing an order for service by publication under Section 281-a of the Code, it is not sufficient to show in the affidavit upon which the order is asked that deponent has made diligent inquiry but has been unable to find the person to be served; facts should be stated from which the court can determine that due diligence has in fact been used.⁸²

A person brought in may file an independent claim and all that has been stated with reference to the filing of a claim will apply thereto. He may offer evidence as if he had filed the original claim and he has the same standing before the Court of Claims as if he were the original party claimant.

F. JUDICIAL NOTICE.*

The Court of Claims may take judicial notice of certain facts as may be done by other courts. The doctrine of judicial notice is based not only upon statutes but upon some principle that dispenses with proof offered in the particular case. As was said in *Town of North Hempstead v. Gregory*,⁸³ the criterion is the maxim, "What is known need not be proved." To illustrate:

"Facts of universal notoriety need not be proved."

"We must be allowed to know what is known by all persons of common intelligence."

"Its early history is a matter of general notoriety and interest throughout the State * * * and for that reason * * * should be judicially noticed," speaking of a certain title.

"Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction."

"The matters of which judicial notice may be taken are those which must have happened according to the constant and in-

⁸². *Goetz v. Solms*, 173 A. D. 373; 159 N. Y. Supp. 552.

Rose v. Heller, 190 A. D. 519; 179 N. Y. Supp. 821.

See "Appendix XX."

* See also *Chamberlayne on the Modern Law of Evidence*, Chap. VIII.

⁸³. 53 A. D. 350; 65 N. Y. Supp. 867.

variable course of nature, * * * or are of such general and public notoriety that everyone may fairly be presumed to be acquainted with them."

"Notice may be taken of facts 'which are generally known.' And as the common knowledge of man ranges far and wide, so the doctrine embraces matters so curiously diverse as, *e. g.*, the rising of the sun, the status of the Isle of Cuba, the late Civil War, the contents of the Bible, the character of a camp meeting, the height of the human frame, the fable of 'the frozen snake,' the characteristics and construction of the ice cream freezer, the general use of the diamond stack or the straight stack spark arrester, the habits of those who shave, in fine, 'all things both great and small.'"

Fifth. Values.*

The real question with which the Court of Claims is concerned is the value of the thing taken. In general, the usual rules applicable to values apply in the Court of Claims.

A. INCUMBRANCES.

If land is burdened by a right of way across same, its value will be depreciated according to the nature of the right. If the right of way affects an entire parcel of land, and if the owner has no right to use such land, the value of the fee owner's interest may be nominal. This is true if the holder of the easement has a perpetual exclusive right of possession or such a right for a long term of years.

A fee owner may have the right to harvest the crops growing on the land and to cultivate the land, subject to the right in another to maintain poles and wires over same. In such a case, the value of the fee would be less than if the easement did not exist and may be depreciated one-fourth or one-half. But the combined value of the fee, subject to the easement, and of the easement, may be greater than the value of the land if the easement did not exist. To illustrate: A parcel of land may be worth

* See also Weed's Practical Real Estate Law, p. 1203.

Chamberlayne on the Modern Law of Evidence, Chap. XXVIII.

\$1,000, but by reason of a right of way across it, only \$800. This does not mean that the easement right is worth only \$200, or the difference between \$800 and \$1,000. The easement right may be worth much more than the land freed from the easement — much more than \$1,000.

Rights of way have been treated as incumbrances. In general, the value of an incumbrance cannot exceed the value of the thing incumbered. The value of a mortgage can be no greater than the value of the property mortgaged. It was apparently on this theory that the Board (Court) of Claims took the position that the owner of an easement must secure his compensation out of an award for the land — that the total value of all interests could not exceed the value of the land — that the easement right did not enhance the value of the land. The Appellate Division held to the contrary, however, in *N. Y. T. Co. v. State*.⁸⁴

The court referred to the opinion of the Board of Claims that the easements “which the claimant obtained for erecting and maintaining its poles constituted an incumbrance upon the underlying fee of the abutting owners, and that the award for the appropriation of the fee of the abutting owners constituted the sole fund out of which all liens and incumbrances could be satisfied,” and criticized same.

Continuing the court cited numerous decisions which held certain things to be incumbrances, viz.:

- (a) The right to dam and use waters of a stream;
- (b) An easement of light and air;
- (c) The use in common of a lane;
- (d) The right to maintain a drain;
- (e) A private right of way;
- (f) A railroad right of way;
- (g) Restriction against buildings;
- (h) Restriction as to use of premises;
- (i) Outstanding lease.

To summarize, an incumbrance was held to be any right existing in another to use land or whereby the use by the owner is restricted.

84. 169 A. D. 310; 154 N. Y. Supp. 1059; af. 218 N. Y. 738, no opinion.

A more limited definition of an incumbrance is given as a right to or interest in land, which may subsist in another to the diminution of the value of the land, but *consistent* with the power to pass the fee by a conveyance.

A restrictive covenant was held to constitute an incumbrance in *Bull v. Burton* (227 N. Y. 101). A distinction was made relative to a party wall, which was held to create "a community of interest" but could not be deemed an incumbrance.

In *Saratoga State Waters Corp. v. Pratt* (227 N. Y. 429), in an exhaustive opinion by Judge Collin, a pure easement was defined as a privilege without profit, that is, without the right to participate in the profits of the soil charged with the easement. If the right existed to take anything from the soil of value, it was not strictly an easement but a *profit a prendre*. Many refinements are indulged in. Each of the rights mentioned involves possession, although title and the broader right of possession is in another. Each is incorporeal real property or a right issuing out of or annexed to a thing corporeal. Each may be attached to or may exist for the benefit of land other than that charged, and be assignable and inheritable. On the contrary, each may be held and enjoyed by an individual distinct from the ownership of any other lands; it is then regarded as held and enjoyed *in gross* and is neither assignable nor inheritable but personal to the holder.

Applying the principles referred to and numerous others cited, it is apparent that a "community of interest" may be created as between the owners of lands and rights of way, which will add to the value of land affected. To illustrate, ten adjoining parcels of land may be worth \$1,000 each or a total of \$10,000. A right of way may exist over and across same, connecting a power generating plant and a distributing plant. If one of the parcels crossed by the right of way should be appropriated, and the right of way be made unavailable, the value of the parcel taken, together with the right of way over same, would be more than \$1,000, depending on the extent to which the break in the right of way would affect the two power stations.

It was held in *Huyck v. Andrews* (113 N. Y. 81) that there is no distinction between incumbrances which affect title and those which simply affect the physical condition of land. Any existing easement, except that of a public highway, was considered an incumbrance.⁸⁵

A restriction, although technically not an easement, has been held to be "in the nature of an easement" and to be an incumbrance upon land.⁸⁶

It thus appears that, although any existing right in another, which may restrict the owner in the use of his land, has been considered an "incumbrance" in the broad definition of that term, incumbrances may be of numerous kinds and with varying effect. They may, by creating "a community of interest," add value to the land even though the *interest* of the owner of the land has been depreciated in value.

B. PART INTEREST.

The value of a part interest should be reduced fifteen per cent., that is, an undivided one-third interest is not worth one-third of the value of the whole. Such a deduction is proper in order to cover the expenses incident to a partition action. The deduction is especially proper if the interest be a minority rather than a majority interest.⁸⁷

C. PURPOSE FOR WHICH PROPERTY IS TAKEN.

The purpose for which lands are taken by appropriation is not material and cannot enhance the value to the owner. So held in *Matter of C. C. H. W. Co. v. Price*,⁸⁸ which also referred to the general rule as to value.

D. PLANS MAY HAVE NO VALUE.

It frequently happens that some corporation has made plans for the construction of a railroad, transmission line, waterworks

85. See also *Callanan v. Keenan*, 224 N. Y. 503.

86. *Dime Savings Bank v. Butler*, 167 A. D. 257; 152 N. Y. Supp. 633.

87. *Matter of Gibert*, 176 A. D. 850; 163 N. Y. Supp. 974.

88. 178 A. D. 687; 165 N. Y. Supp. 816.

or other development, which contemplates the taking of a parcel appropriated by the State. The question arises as to whether the owner, so planning, is entitled to compensation because the plans cannot be carried out by reason of the appropriation by the State. Such question was before the court in *People v. A. R. Co.* (160 N. Y. 225). In this case, a railroad company had filed a map showing the proposed location of a proposed railroad over lands appropriated by the State for public park purposes. It was held that the filing of the map gave a warning to other railroads that a certain route had been pre-empted, but that it established no right against the owner because the Constitution forbids it, and that it established none against the State because the State's power is paramount. (Page 246.)

Prospective benefits, by reason of proposed developments in the immediate neighborhood of land appropriated, may not be considered. In *Matter of City of Syracuse* (188 A. D. 947), it was held that the possibility of the use of lands in connection with the Barge Canal, as a suitable place for receiving and shipping freight, could not be considered. The cost of development to make the lands available did not appear; neither did it appear that such lands could be used with profit so as to affect their present market value.⁸⁹

E. OFFSETTING BENEFITS.

Under the early canal acts, the appraisers were directed to estimate the benefits as well as the damages. In a given case, the damages were fixed at a specified sum, but the benefits conferred upon the owners of the land taken, to the residue of their property, were estimated in excess of the damages so that no damages were awarded over and above the benefit.⁹⁰ The constitutionality of the provisions was questioned, as a taking of property without making compensation as required by the Constitution, but the appeal was decided on other grounds.

In the year 1907, the question of offsetting benefits was considered at length by the Appellate Division in *Matter of City of*

89. See also *Matter of Bronx Parkway Com.*, 230 N. Y. 79, memo.

90. See *Eldridge v. City of Binghamton*, 120 N. Y. 309.

New York.⁹¹ The Binghamton case⁹² was cited with apparent approval, but on appeal to the Court of Appeals, the Appellate Division was reversed.⁹³ Judge Cullen, writing the opinion, referred to five rules adopted by different States:

1. Benefits cannot be set off at all.
2. Special benefits may be set off against the remainder but not against the part taken.
3. Benefits, both general and special, may be set off against the remainder but not against the part taken.
4. Special benefits may be set off against the part taken and the remainder.
5. Benefits, both general and special, may be set off against the part taken and the value of the remainder.

New York State had been placed in the last classification but Judge Cullen held improperly so; that the question was an open one. He pointed out the distinction between an award made for lands condemned under the power of eminent domain, and the assessment of benefits under the power of taxation. Specific reference was made to the Binghamton case⁹⁴ and to the ground on which it was decided. The conclusion was reached that benefits may only be taken into consideration and set off against damages for lands taken in case the owner is liable for benefits derived to lands not taken by reason of the improvement under a right of taxation to pay for the cost of the improvement. He stated the rule as follows:

“The principle underlying these cases is, however, the right of the municipality or State to tax the owners of the land left in order to pay for the land taken, on the ground that they are specially benefited by the taking and hence should be specially taxed for the payment of the land.”

Viewed solely as an exercise of the power of eminent domain, benefits may be set off against consequential damages to the part

91. 120 A. D. 849; 105 N. Y. Supp. 750.

92. *Eldridge v. City of Binghamton*, 120 N. Y. 309.

93. 190 N. Y. 350.

94. *Eldridge v. City of Binghamton*, 120 N. Y. 309.

of the land not taken, but in no case should an award be made for less than the value of the property actually taken. (Page 360.)

Notwithstanding this decision of the Court of Appeals in December, 1907, there is an opinion of the Attorney General, dated April 23, 1908, reported at page 230 of the Reports of the Attorney General for that year, in which he states that benefits to accrue may be deducted from any damages sustained because of the appropriation, citing the Binghamton case.

The reason why benefits to lands not taken should not be set off against the value of the part taken is that there is no assurance of benefits; the proposed improvement for which the land is taken may never materialize, or if it does, it may not be maintained. A canal may be abandoned and land used for other purposes to the detriment of the adjoining lands. The same has been held to be true as to lands taken for railroad and park purposes. If the fee is taken, there is no limitation to the use to which the lands may be put or to the disposition thereof. No right of reversion is left in the original owner.

F. RIGHT OF DOWER.*

The value of a consummate right of dower should be fixed according to the Carlisle Table of Mortality, as prescribed by Rule 70 of the General Rules of Practice adopted by the Supreme Court.

If an inchoate right of dower has value, the rule for computing same may be found in *Jackson v. Edwards* (7 Paige, 386, 408).

In order to compute the amount, it is necessary to have tables. Such tables were published by Robert Clarke & Co. in 1882 (Cincinnati). They were prepared by Florien Giauque and H. B. McClure.

Reference to Rule 70 and the application thereof may be found in *Sperduto v. N. Y. C. I. R. Co.*⁹⁵

* See also *Weed's Practical Real Estate Law*, p. 381.

95. 186 A. D. 145, 53; 173 N. Y. Supp. 834.

G. LANDS UNDER NAVIGABLE WATERS.

The rights in and to lands under navigable waters may be as follows:

1. Ownership in fee by upland owner or another.
2. Right to fill in or occupy with fee ownership remaining in the State or vested in another.
3. Common-law right of upland owner in and to same.

These rights do not necessarily have the same value.

It has been contended that the owner of the fee of lands under navigable waters, burdened by a public right of navigation over and upon such waters, had property of a nominal value only, on the same ground that the fee of lands within a public street has only a nominal value. In *Matter of City of New York* (216 N. Y. 67), the city instituted a proceeding for the purpose of acquiring title in fee simple to lands at the end of a public street which terminated at high water line, for the purpose of extending the street beyond the high water line. A nominal award was made. It was contended that under the common law of the State the lands under water, below the high water line contiguous to the street terminus, were subject to a right of public travel. The Court of Appeals stated that the contention was sustained by the authorities and that a perpetual right of way existed in favor of the public between the terminus of the street at high water line and the navigable waters; that the public had a right to pass directly from the street end to the sound and from the sound to the street, that is, to go from the land highway to the water highway, and *vice versa*; that if the space between the street end and the navigable waters should be filled in or displaced by earth, or if a wharf or structure is built out from the street end to the waters, the easement of the street is extended by operation of law to the end of the filling or the structure. The public, having this right of passage, may exercise it subject to other or additional property rights which cannot be destroyed or taken without compensation. The public right of travel did not exhaust or annihilate the uses of which the land was capable or the property rights inherent in the ownership thereof. The land

might be used in any way so long as the right of the public passage was not destroyed, or so long as the use did not interfere with navigation. This right of the fee owner was transferable and protected by the constitutional provisions guaranteeing compensation. The value thereof was not necessarily limited to a nominal sum.

The value of lands under water and piers or docks located thereon, as well as the use of the water between such piers, was considered in *Matter of Public Service Commission* (224 N. Y. 211). A distinction was made in that the acquisition of the fee of the lands under water left them subject to the right of navigation which was not interfered with as a result of the taking. The lands taken were covered by a slip between two piers, the use of which would not be interfered with as a result of the taking.

The fee of lands under water filled in would be as valuable as if always dry land. If not filled in, other considerations enter.

The Legislature has directly granted the right to fill in without conveying title to lands under water. The Commissioners of the Land Office have granted similar rights. The value of such a legislative grant was before the court in *First Construction Co. v. State* (221 N. Y. 295). The grant was termed a franchise. The value of the right was held to be "the value of the land when filled in, less the cost of filling." The addition of value, as the result of filling, may be greater or less than the cost of filling. Other features may differentiate the value of the fee and the value of the right to acquire the fee, subject to conditions and obligations.

The right to erect sheds upon piers located in navigable waters and the value thereof was considered by the Court of Appeals in *Matter of City of New York* (227 N. Y. 119). The value of a shedded pier, due to the exclusive use thereof by an individual, was held to be greater than the value of an unshedded pier which was open to the public.

The common-law rights of an upland owner were considered in Chapter XX, First, hereof. The right of access to the navigable part of navigable waters adjacent to uplands subject to the common-law rights of the public in and to the foreshore, cannot be destroyed or impaired, excepting in the interest of commerce or navigation for the benefit of all the People, even by legislative authority. Any interference with such right will result in damages to the upland owner. If the State interferes with this right of access, in the interest of commerce or navigation, it is not liable. The State might be liable for any other interference. This would include the erection of any structure not in the interest of commerce or navigation. The value of the right of access would depend, in part, upon the value of the upland to which the right of access is an appurtenance.

H. TIMBER.*

The value of trees, standing on lands appropriated by the State, is the same as in case of a conversion. It is the value upon the stump. If there is a market price at which the timber could be replaced at the place of appropriation, such market price would be the proper measure of damages. If there is no market price or value at the place of appropriation, it is necessary to take the value at the nearest market place and deduct the expense of removing the timber to such market place.⁹⁶

I. RAILROAD LANDS.

If a railroad company has acquired lands *by deed for railroad purposes*, its use is not limited; it is the owner in fee and may convey.⁹⁷ If such lands are appropriated by the State, the company is entitled to the value thereof.

A distinction has been made in case a railroad company acquires lands for railroad purposes *by condemnation*. In *Strong v. City of Brooklyn* (68 N. Y. 1), it was held that lands so ac-

* See also *Weed's Practical Real Estate Law*, p. 1157.

96. *Turner v. State*, 67 A. D. 393; 73 N. Y. Supp. 372.

97. *Matter of City of New York*, 190 N. Y. 350, 358.

quired cannot be used for other purposes, unless additional compensation is made to the owner of the fee.

It was later held in *Vandermulen v. Vandermulen* (108 N. Y. 195) that the acquisition of lands by a railroad company by condemnation operated as a sale and as a transfer of title to the company; in theory, the owner takes the compensation awarded as a substitute for the land. "The proceedings operated as a sale of the property taken and a purchase thereof by the company, and the interest acquired, whatever its exact legal character, was scarcely less than a fee. If a technical reversion remained in the defendant, the interest was so remote that its value is scarcely appreciable." The title acquired would vest during the corporate existence of the company or as it might be extended by legislation; it might also be transferred to a new corporation.

It therefore appears that a railroad company is entitled to the full value of lands appropriated by the State, whether such lands are owned by the railroad company in fee or by virtue of condemnation proceedings.⁹⁸

J. FRANCHISE.

The value of a franchise and right to erect and maintain telephone poles and wires was considered in *N. Y. T. Co. v. State* (169 A. D. 310; 154 N. Y. Supp. 1059; af. 218 N. Y. 738). Three questions were involved, namely:

1. Value of franchise.
2. Value of easement.
3. Value of structures.

The court held that, if the franchise had been exercised and in reliance thereon easements had been acquired to erect a telephone line upon the highway, and a line had been erected, the franchise, easement and physical structures became property of which the owner could not be deprived by the State without compensation. No value was placed upon the franchise alone. The value of the easement was stipulated at \$1.00 per pole.

⁹⁸ See also *Miner v. N. Y. C. R. R. Co.*, 123 N. Y. 242.

Roby v. N. Y. C. R. R. Co., 142 N. Y. 176.

L. I. R. R. Co. v. Mulry, 212 N. Y. 108.

The right to erect and maintain poles upon the highways is general to telephone and telegraph companies but until exercised has no value.

A right granted by the Legislature to fill in lands under navigable waters was considered a franchise in *F. C. Co. v. State* (221 N. Y. 295, 317). The value thereof was fixed as the difference between the value of the lands under water after being filled in less the cost of filling, subject to certain conditions which might exist and which should be taken into consideration. If the right to fill in gave only the right to use the filled lands as a dock, and if the filled lands could not be used for general beneficial purposes such as might be exercised by an owner in fee, the value of the land would not be the fee value but something less. This would depend on the value of the filled land for the uses to which it could be legally put under the franchise.

K. REVOCABLE FRANCHISE OR LICENSE.

A franchise may be revocable and subject to forfeiture by failure to exercise it or by abandonment after it has been exercised. If no time is prescribed, it must be exercised within a reasonable time.⁹⁹

Until a revocable license has been revoked, it has value, although there may be difficulty in arriving at the value thereof. *Matter of City of New York* (227 N. Y. 119) involved the value of a license or permit to erect a shed upon a pier in the City of New York. A distinction was made between:

- (a) An unshedded pier.
- (b) A shedded pier under a revocable license.
- (c) A shedded pier under an irrevocable license.

The first two were valued the same. The court held that there is, or may be, a difference in value, as indicated by the testimony, between a revocable license unrevoked and an irrevocable license.

The difficulty of fixing the value of any revocable right is

⁹⁹ *F. C. Co. v. State*, 221 N. Y. 295, 319.

apparent. The law of probability always steps in. If the right should never be revoked, it would be as valuable as an irrevocable right. If it should be revoked immediately, it would have no value. This leaves the question open to more or less speculation. A fixed policy on the part of a city or of the State, relative to property similarly situated, might indicate the probability of a revocation. So, a failure to improve within a reasonable or fixed time, or a failure to improve on account of excessive cost of improvement or because the property would not be desirable or available if improved, might indicate an abandonment or forfeiture.

This difficulty of fixing the value of a revocable right was recognized in *F. C. Co. v. State* (221 N. Y. 295, 321). To quote:

"The liability to forfeiture of claimant's rights for non-user has been somewhat discussed by counsel and considered by us. If it should appear on the new hearing, which is necessary, that, at the time of the appropriation by the State, claimant's franchise had become subject to forfeiture or to a *bona fide* serious claim of forfeiture, this might be claimed to be an element to be considered in fixing its market value in these proceedings. While we have deemed it necessary in determining the character of claimant's rights to indicate our views in respect of a liability to forfeiture for non-user, we shall not express any opinion upon the question whether the findings indicate a liability to forfeiture at the time of the appropriation or whether liability to such forfeiture or to a serious claim thereof, if established, could properly be considered in these proceedings in fixing values. Those questions were not tried or considered in the courts below, at least under any such theory as we are holding to be applicable to claimant's position, and we deem it more just to withhold our consideration of them, if necessary at all, until such consideration has been had.

"There may be still other conditions which would be a proper subject of consideration in fixing values upon the theory which we have adopted. We are not attempting to foresee and make a full and complete statement of every one of these. We are simply stating some of them to sustain

the proposition that there must be a new hearing of the claim."

A new hearing was had before the Court of Claims and a decision rendered by that court,¹⁰⁰ holding that the rights granted by the Legislature had not been "questioned, withdrawn, revoked, forfeited or abandoned" and that claimant had "an inchoate vested interest in lands * * * a property right;" that such right was capable of being transferred and that it had a very substantial market value. The Court of Claims awarded the same value for the lands under water not filled in as for the lands under water filled in, less the cost of filling the lands still under water. An appeal was taken to the Appellate Division, which affirmed by a divided court.¹

An example of a revocable license created by acquiescence or parol consent² may be found in *Munter v. Kobre* (107 Misc. 261). It was held that such a license even when executed was not irrevocable. Such a license could not have value. A structure erected pursuant thereto may have value, but the owner of the land on which it is erected, rather than the one who erected it, would be the one entitled to compensation.³

L. VALUE ON RE-CONVEYANCE.

Lands appropriated under the so-called Barge Canal and Terminal Acts may be re-conveyed in whole or in part, in fee or subject to reservations. In case of such a re-conveyance, if the Canal Board does not fix the value of the part not re-conveyed or damages resulting from the appropriation, in the first instance, the Court of Claims may fix such value or damages or both on condition that a re-conveyance be made, subject to the approval of the Canal Board. If the re-conveyance is first made, the

100. 110 Misc. 164; 180 N. Y. Supp. 241.

1. 194 A. D. 608.

2. See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 17, p. 625.

3. See also *Duryee v. Mayor*, 96 N. Y. 477, 84. *Munson v. Reid*, 46 Hun 399.

Court of Claims may likewise fix such value or damages or both, if the Canal Board has not fixed the terms.⁴

M. HIGHWAYS AND STREETS.*

The question of the value of lands lying within highways and streets has been a most disturbing one, due undoubtedly to the multiplicity of interests. Three questions are involved:

1. Fee ownership.
2. Private easements.
3. Public easements.

On the origin of the State Government, certain highways were in existence. Later, as the State granted lands, it reserved "five acres of every hundred acres so sold, for highways." The conclusion has been reached that this was a reservation of an easement for the benefit of the People and that the fee passed to the patentee.⁵ Whether or not highways were thereafter laid out by virtue of this reservation does not appear from the records.

Highways were, however, laid out:

Pursuant to this reservation, or
by dedication, or
by user, or
as provided by statute.

The provisions for laying out highways and as to highways by dedication and use, as now existent, are found in Article VIII of the Highway Law.

1. *Fee Ownership.*

In general, lands within a highway or street are owned in fee by the owners of lands adjoining same or by another. This ownership is subject to the easements in favor of adjoining lands for purposes of ingress and egress.

4. Section 5, Barge Canal Act.

* See also Weed's Practical Real Estate Law, p. 1004.

5. See "Appendix I."

Highways, not being so numerous as streets, and passing through property not as valuable as that through which streets pass, are less frequently involved than streets. The question as to the value of lands within a street arises very often by reason of the appropriation by the State of lands within streets.

As a result of the growth of villages and cities, lands formerly used for agricultural or other purposes have been laid out into lots and streets, and in many instances maps thereof showing such lots and streets have been made and filed. This alone did not affect the fee ownership.⁶

In general, a conveyance of such a lot carried title to the street or streets adjoining such a lot — if an interior street, to the center thereof, and if an exterior or marginal street, to all of same.

In many instances, lots only were conveyed, the fee title to the lands within the street remaining in the grantor.⁷

If the fee of a street was conveyed as a part of a lot, it became burdened with a private easement for the benefit of the other lots, in so far as it became necessary for purposes of ingress and egress to and from the other lots.

The same would be true in case the fee of the street was retained by the grantor of the lots.

An easement of access applies only in blocks in which lots are sold.⁸

This fee ownership, whether vested in the owner of the adjoining lots or in the common grantor, has been generally held to have only a nominal value, as it would always be subject to the rights of the several lot owners for purposes of travel.⁹

The general public might travel such a street and the question of a public easement arise by dedication or user.

A highway or street does not become public by dedication¹⁰

6. *Matter of City of New York*, 186 A. D. 457; 174 N. Y. Supp. 600.

7. *Tietjen v. Palmer*, 121 A. D. 233; 105 N. Y. Supp. 790.

8. *Matter of City of N. Y.*, 186 A. D. 457; 174 N. Y. Supp. 600.

9. See *Stillman v. City of Olean*, 184 A. D. 323; 171 N. Y. Supp. 445; rev. 228 N. Y. 322.

Matter of City of New York, 196 N. Y. 286.

10. See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 21, p. 254; Bk. 29, p. 837.

alone; there must be an acceptance by the public authorities competent to accept the highway or such a common user as to make the highway or street public. But, general user by the public at large alone, without the accompanying acts of the municipal authorities in repairing or maintaining it, may not constitute a public highway.¹¹

A dedication followed by acceptance by the municipal authorities does not vest the fee in a municipality.¹²

In some instances, the common grantor has conveyed the fee of a street to a village or city in which the land is located. The village or city might take the fee, subject to the private and public easements referred to; this fee would have no more value than before the conveyance; the municipality by taking the conveyance could create no value. The question has arisen as to whether a municipality can acquire a fee in a public street as against the State.

“Where the fee of a street or highway is in a city, the city holds the street in trust for the People at large.” “Such fee would not be such a property right as would be protected by the * * * Constitution.”¹³

The distinction between governmental and private ownership in streets by a municipality was considered at length in *People v. Kerr* (27 N. Y. 188). Held, that in case of an ordinary highway, all that the State or the public obtain by the dedication or opening of same is an easement of a limited character; that even though the entire title in fee to a street should vest in a city, as a result

11. *Matter of Starr St.*, 73 Misc. 380; 131 N. Y. Supp. 71.

Citing *People v. Underhill*, 144 N. Y. 316, and *Smith v. Smythe*, 197 N. Y. 457.

See also:

Stockwell v. Dunkel, 174 A. D. 481; 159 N. Y. Supp. 32.

Johnson v. Niagara Falls, 230 N. Y. 77.

Matter of Wallace Ave., 179 A. D. 172; 166 N. Y. Supp. 429; rev. 222 N. Y. 139.

12. *Matter of Mayor of N. Y.*, 131 A. D. 696; 116 N. Y. Supp. 471; *af. 197 N. Y.* 518.

13. *McCutcheon v. T. S. Co.*, 168 A. D. 301, 10; 154 N. Y. Supp. 711.

of the exercise of the right of eminent domain, it would so vest "for public purposes and not for profit or emolument of the city;" that the title so acquired is under the control of the Legislature "for any public purposes, as any property held directly by the State;" that the same condition of title would result in case the lands were acquired by voluntary grants or conveyances such as were before the court.

These governmental trust powers of municipalities were also discussed in later decisions.¹⁴

A recent decision, *People ex rel. Palmer v. Travis* (223 N. Y. 150), is to the effect that there is a distinction between property held for governmental purposes and that owned by a municipality in its so-called private capacity; "that as to the former the Legislature has absolute control" and "may take it without compensation or devote it to such public purposes as it thinks best."

It thus appears that the fee ownership of lands within a highway or street, when vested in an individual, has only a *nominal* value, and when vested in a municipality, *no* value.¹⁵

The municipality, as such, could have no proprietary interest in lands acquired for street purposes if it assessed the cost of opening a street, including the land taken, against the land benefited by the improvement; it would simply act in its governmental capacity in opening the street. If, however, the municipality should acquire the fee and pay a full value therefor out of the general funds, it might have more than a nominal interest should the lands within the street be taken by the State for other purposes. But, even though the municipality might have an *interest* represented by an expenditure made by it for the land, such land would generally be burdened by easements for the benefit of adjoining

14. *Darlington v. Mayor*, 31 N. Y. 164.

County of Albany v. Hooker, 204 N. Y. 1.

See also *Ogden v. New York*, 141 A. D. 578; 126 N. Y. Supp. 189.

Canavan v. Mechanicville, 229 N. Y. 473, 6.

15. See *People ex rel. Brown v. Purdy*, 186 A. D. 54; 173 N. Y. Supp. 782; *af. 226 N. Y. 635*.

Matter of City of N. Y., 186 A. D. 457; 174 N. Y. Supp. 600.

Matter of City of N. Y., 212 N. Y. 538, 45.

Matter of Board of Water Supply, 73 Misc. 231, 42; 130 N. Y. Supp. 997; *af. 151 A. D. 885*.

property. The interest of the municipality would, therefore, have only a nominal *value*, when taken by the State.

In *Matter of Board of Water Supply*,¹⁶ an award of \$1,350 was made to the owners of the fee of lands within a street, subject to the easements therein of the owners of adjoining lands. It appeared that the public authorities were very likely in the near future to abandon the highway, and it was held that the award was warranted by reason of the contemplated abandonment. Other lands within the streets were held to have a nominal value only and nominal awards were directed. (Page 242.) This decision was affirmed without opinion. It was distinguished in *Walker v. Mueller*.¹⁷

Although it has been urged that the fee of lands within a street has value, it is hardly conceivable that such value can be more than nominal under any circumstances, if the fee owner does not own adjoining lands. Even though the fee owner of the street owns an adjoining lot, so long as the street is burdened by private or public easements, or both, and until same are extinguished, the lands within the street could not be privately utilized and would have no value.

Although there is no rule of law that the fee of lands in a street has only nominal value, such must generally be the result, the theory being that the value of land within a highway or street merges in the adjoining lands. Such value becomes extinguished as to the land in the highway or street and is added to the value of the adjoining lands in the form of an easement or right of ingress and egress. To quote from *Matter of City of New York* (196 N. Y. 286):

“Walker, a typical owner of the fee in the street, had and could have no benefit accruing from such ownership, for he owned no adjoining property that could be helped thereby, and the street itself in the very nature of the case could never produce any valuable thing. A naked unproductive fee, incapable of any pecuniary advantage, existed. Walker owned some barren interest — that was all. The city took from him

16. 73 Misc. 231; 130 N. Y. Supp. 997; af. 151 A. D. 835; 206 N. Y. 680.

17. 160 A. D. 704, 8; 145 N. Y. Supp. 797.

this land, as to Walker useless, bereft of enjoyment and incapable of earning. In the absence of reliable evidence that it had value, every consideration shows that it had only nominal value. Hence, the owner of the fee should share nominally in the award."

A substantial sum was awarded to unknown owners, but the Court of Appeals held that it was unwilling to take part in the division of the fund to which the claimants were not justly or equitably entitled.

A country highway may be productive outside of the traveled part and have value, even though a street may not.¹⁸

If the private or public easement has been extinguished, the fee of the street would not have value, but if both are extinguished it would have substantial value. The existence and duration of a street was considered by Judge Vann in *City of Buffalo v. D. L. & W. R. R. Co.* (190 N. Y. 84). The public *authorities* may formally close a street or the *general* public may cease to use it.

A public easement may be extinguished by preventing the general public from using a street although the act may be unlawful.¹⁹

2. *Private Easements.**

The right of access or of ingress and egress is the thing of value. Without it an adjoining lot may be practically valueless. If this right is taken or destroyed as a result of an appropriation by the State of the land in a street, the owner of an adjoining lot is entitled to compensation for the injury done to such lot, the same as if the street should be closed in a street closing proceeding.²⁰

18. See *Town of Clarendon v. M. Q. Co.*, 102 A. D. 217; 92 N. Y. Supp. 530. Weed's Practical Real Estate Law, p. 1158.

19. *D. & J. Co. v. Tarrytown*, 177 A. D. 742; 164 N. Y. Supp. 1090.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 4, p. 30. Weed's Practical Real Estate Law, p. 397.

20. See *Matter of Wallace Ave.*, 179 A. D. 172; 166 N. Y. Supp. 429; rev. 222 N. Y. 139.

Whether the State through the Legislature employs the agency of municipal officials to bring about such closing or the agency of State officials can make no difference.²¹

No liability results if the public improvement still leaves lots accessible by public ways. While a highway or street may not be closed to prevent access, "it is enough if access" * * * "is preserved though such access may not be quite so convenient as it would be if the street were allowed to remain open."

An outlet must be preserved to the next cross street on each side of the lot affected but not over all the streets shown on a map on which the lot was delineated. Such a preservation may not be required in certain cases; a single outlet may be sufficient.²²

If private as well as public easements have been extinguished before appropriation by the State, the land will be considered the same as other lands, and valued accordingly. Such easements may be extinguished by street closing proceedings. The act relating to proceedings in the City of New York and the effect thereof was considered and the authorities reviewed by Judge Bartlett in *Barber v. Woolf* (216 N. Y. 7).

3. *Public Easements.*

The general public has the right to travel any highways or streets opened by public authority or dedicated to the public use. If such a highway or street is closed by the State, no liability results. Even the municipality through which the highway or street passed has no claim against the State for loss of right to travel.

A municipality may in its so-called private capacity own certain property in a street, such as an improved surface, curbs, water-mains, sewers, lighting and heating conduits. If these are appropriated, the municipality may be entitled to compensation. But this is to be distinguished from the naked right to maintain a street or the fee ownership subject to the right of private and public travel.

21. *Reis v. City of N. Y.*, 188 N. Y. 58, 67.

22. *Reis v. City of N. Y.*, 188 N. Y. 58, 68.

4. *Generally.*

In general, the State takes lands rather than some right, title or interest in and to lands. A marginal street may be taken and an entire block of lots left without an entrance. This would result in a very substantial damage²³ to all but the corner lots, which would still have access from the side streets. As a result of such taking, the owners of lands in adjoining blocks may be required to travel three blocks instead of one to reach a freight or passenger station but they could recover no damages. Highways or streets may be cut in two at a particular point or lengthened by the removal or change of a bridge forming a connecting link in the highway or street. Approaches to a bridge and forming a part of a highway or street may be rendered useless and no liability result to the owners of adjoining property if another means of travel is provided. Unless an individual has a private right of value which is protected by the constitutional guarantee, he cannot recover for inconvenience suffered.

N. CHANGE OF GRADE.

The authorities are uniform that the change of a grade of a street or highway does not give rise to a claim for damages, unless the Legislature has provided for such damages. No award can be made for such a claim and no value can be fixed although damages may result. It matters not that an elevation of a highway by the State may effect the overflow of a stream to the damage of an adjoining land owner, if there is no interference with the watercourse.²⁴

A distinction was made by a divided court in *Brooks v. State* (189 A. D. 24). The watercourse was interfered with by building a dam across it and raising the water therein. A highway paralleled the watercourse. This was raised and made to serve as an embankment in order to impound the water. It was held that this was not primarily a change of grade but a canal improvement

23. See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 30, p. 668, as to liability when municipality abandons highway.

24. *Burmester v. State*, 186 A. D. 131; 173 N. Y. Supp. 787; *af. 227 N. Y. 653.*

in which the old highway was incidentally destroyed. Claim was made for damages to lands adjoining the highway because they were left below the grade of the highway. Held that claimant was entitled to compensation for damages to such lands.

The principle, that the owner of property abutting upon a highway which is graded or changed by the public authorities has no right of action under the common law, was expressed in *Smith v. B. & A. R. R. Co.* (181 N. Y. 132, 44). However, it was held that a liability was created by Section 63 of the Railroad Law, which provided for the acquisition of "lands, rights or easements." It was stated in the opinion of Judge Haight that where, by the elimination of a grade crossing by carrying a highway under or over a railroad, the highway was depressed or elevated, thereby cutting off access to adjoining lands or limiting the use of such access, damages resulted for which compensation should be made.

The views of Judge Haight were adopted and followed in *People ex rel. Dole v. Town of Hamburg* (58 Misc. 643; 109 N. Y. Supp. 913; af. 127 A. D. 948, without opinion; af. 193 N. Y. 614) on the opinion of Judge Haight.²⁵

It is to be noted that the State was not primarily concerned under Section 63 of the Railroad Law in that it did not acquire lands, rights or easements, but that these were acquired by the municipal corporation in which the highway crossing was located. The present section of the Railroad Law is numbered 92 and provides that:

"The municipal corporation having jurisdiction over the street, avenue, highway or road and in which the crossing is located, or the state commission of highways in case of a street, avenue, highway or road to be constructed or improved as a part of a state or county highway, may with the approval of the railroad company acquire by purchase any lands, rights or easements necessary or required."

25. See also *People ex rel. Dawson v. Edwin Duffey*, 177 A. D. 949; 164 N. Y. Supp. 1107; af. 221 N. Y. 594.

O. GENERALLY.

General rules as to value have been set forth by former Judge Haight of the Court of Appeals acting as an official referee, hearing claims filed for the appropriation of land. In *Pratt v. State* (2 St. Dep. Rep. 356), Judge Haight stated as follows:

“The rule as I understand it is that the owner is not limited in compensation to the use which he makes or has made of his property, but that he is entitled to receive its greatest value for any purpose for which it is adapted. It still, however, must be limited to its market value and in determining such value, resort may not be had to profits made in the conduct of business which may be speculative and uncertain. It consequently has been held that while the profits of the business are not allowable, still the fact that business is conducted upon the premises becomes a factor in determining the value of the premises. The farmer working a farm upon a lease, who has planted the same with crops and then had the farm taken from him at about the time the crops had matured and were ready for harvest, would be entitled to show the fact as bearing upon the value of his lease and as an aid in the determination of such value. So also a person who had acquired interest in real estate by a contract of purchase for standing timber, in case the premises were taken from him before he had an opportunity to cut and remove the same he would have the right to show the amount thereof and its value, not for the purpose, however, of being awarded damages as profits alone, but for the purpose of showing the value of his leasehold interest. And also the water power of an owner, which is a mere appurtenance of the upland, must be included in the award made for the upland inasmuch as no award for water power can be made separate from the land.”

He also quoted from other decisions as follows:

“It is doubtless true, and settled by authority, that the landowner is not limited in compensation to the use which he makes of his property, but is entitled to receive its greatest

value for any purpose. But still it is the market value of the property that is the measure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must also be shown that it is marketable for that purpose, or has an intrinsic value. If on a farm there was a quarry or deposit of ore, the owner would not be limited to the value of the land as a farm, but would be entitled to compensation for the quarry or mine, if it enhanced the value of the land. But though the stone of the quarry was good, or the ore rich, if the location of the land was such, either from lack of transportation facilities or for other reasons, as to render the quarry or deposit of no practical advantage or value, then he would be confined to the value of his land for farming purposes. So in this case as to villa sites. Nearly any tract of land or any farm can be cut up into lots or villa sites. The question is not whether it can be so subdivided, but whether purchasers for the lots can* be sold at intervals, and a number of years must elapse before the whole property can be disposed of, it is apparent that it would be unfair to take as the present value of the property a sum only to be realized after a long lapse of time." * * *

"In determining the value of land appropriated for public purposes the same conditions are to be regarded as in the sale of property to private parties. The inquiry in such cases must be, what is the property worth in the market viewed, not merely with reference to the uses to which it is plainly adapted, that is to say, what is it worth from its availability for valuable uses. The property is not to be deemed worthless because the owner allows it to go to waste or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it conserve the necessities or conveniences of life."

Judge Haight also expressed similar views in *Palmer v. State* (11 St. Dep. Rep. 46, 66).

* The quotation is from *Matter of Daly v. Smith*, 18 A. D. 194, 7. The following words are omitted: "be found, and also how speedily found. For if only small parts can."

Judge Rooney of the Board of Claims said in an opinion in *S. V. S. v. State* (3 St. Dep. Rep. 230, 5):

“That market value of property taken for public use is the correct measure of damage. All the favorable facts of the property together with its improvements and capabilities may be shown in estimating value.” * * *

“On the other hand, all unfavorable facts may be shown. Speculative values, as to possible use or possible improvement of the property, are improper unless it can be shown that such speculative values or probabilities or potentialities are actually reflected in the market value at the date of the appropriation.” * * *

“So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances may modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.” “As to hypothetical, speculative and conditional damages being improper, a long line of cases may be cited.”

He quoted Judge Bartlett, who, in speaking of the value of property taken, held as follows:

“If it be useful for agriculture or for residence purposes; if it has adaptability for a reservoir site or for the operation of machinery; if it contains a quarry of stone or a mine of precious metals; if it possesses advantages of location or availability for any useful purposes whatever; all these belong to the owner, and are to be considered in estimating its value.”

In *People ex rel. Brown v. Purdy*,²⁶ the market value of real estate was held to be “what a purchaser, who is not compelled to

26. 186 A. D. 54, 7; 173 N. Y. Supp. 782; af. 226 N. Y. 635.

buy, will pay under ordinary circumstances, to a seller who is not compelled to sell."

An award cannot be based upon a theory of damage derived from conjectural estimates and opinions concerning the adaptability of the property for certain specific business purposes. The owner should have the "fair market value for all available uses and purposes."²⁷

The value should be fixed as of the date of taking; not the value at the time of trial.²⁸

Sixth. Awards.

A. GENERALLY.

1. *Who Entitled To.*

Although awards are generally made by the Court of Claims for property taken and not for specific interests in and to same, and the court cannot determine conflicting claims thereto without consent (Section 268-a, Code), no award should be made unless all the parties in interest are before the court. They may be brought in under Sections 281 and 281-a of the Code. The award should be made to those who are or may be entitled to compensation. This includes all who have or who might have filed a claim for a parcel of land or for lands, structures, waters or interests therein appropriated, taken or damaged.

2. *Searches — Abstracts, Etc.**

The persons in interest are usually disclosed by an abstract of title, commonly called a search, and an examination of title. Searches are procured by the Attorney General, who causes the title to be examined and reports to the Court of Claims under Section 281-a of the Code.

But not all persons in interest are so disclosed. An examination of the premises is required to discover persons in possession.

27. *Matter of Bronx Parkway Com.*, 191 A. D. 212; 181 N. Y. Supp. 265.

28. *Matter of Mayor*, 40 A. D. 281; 58 N. Y. Supp. 58.

* See also Weed's Practical Real Estate Law, p. 1133.

CODE references. See Author's Note and Distribution Table — page xxiv.

In certain cases affidavits are sufficient to show all rights and interests not disclosed by the search. Section 264 of the Code provides that the Attorney General may require a claimant to be sworn and to file "an affidavit stating any material facts relating to such title."

Most acts providing for the appropriation of lands by the State require an approval of title by the Attorney General. In the absence of such an act, the Comptroller would naturally look to the Attorney General as his legal adviser for an opinion as to the effect of a search filed with the Comptroller under Section 269 of the Code. On the Attorney General rests the duty of seeing that an award is made and paid to the proper person and to no one else. Of course the Attorney General cannot act arbitrarily and say he is not satisfied with an abstract without giving a reason. As was stated by Judge Andrews in *People ex rel. Palmer v. Travis* (223 N. Y. 150, 5):

"But the abstract must be satisfactory and show that the person who demands the damages is legally entitled thereto. Satisfactory to whom the respondent asks. To no one in any personal sense. Neither the Comptroller nor the Attorney General may say arbitrarily we are not satisfied with the abstract; it does not show the claimant entitled to damages. In the last analysis the question is one of law. Is the abstract satisfactory in form? Does it show what the statute requires it to show? That question is to be answered by the courts. Undoubtedly, the Comptroller does and should consult with the Attorney General. But on neither officer rests the ultimate decision. Only if there is some reasonable doubt should their rejection of the abstract be sustained."

It is true that the Attorney General in approving or disapproving a title expresses an opinion only, yet that opinion is controlling until reversed by the courts.²⁹

An abstract of title made by a county clerk will not show instruments recorded or filed in other offices; it will not show

²⁹ *Grace v. Town of N. Hempstead*, 166 A. D. 844, 51; 152 N. Y. Supp. 122; *af. 220 N. Y. 628*.

CODE references. See Author's Note and Distribution Table — page xxiv.

mergers and consolidations of railroad and other corporations or a claim of title by adverse possession or dower rights. In case of the death of an owner intestate, there will be nothing to indicate the names of the heirs or that a conveyance executed by an heir is executed by the only heir, unless there is a recital to that effect.

An abstract of title made by a title company may show some of these facts. (For sources of title, see page 582.)

In either case, much remains for the Attorney General in the examination of the abstract submitted and of the title generally. Every link in the chain of title must be examined for infirmities, such as probate and foreclosure proceedings and proceedings to sell decedent's or infant's real property.

As stated in the Palmer case³⁰ "the abstract must be satisfactory and show that the person who demands the damages is legally entitled thereto." If it does not so show, the person claiming should dispose of outstanding interests as disclosed by the abstract. He might secure a release and assignment from the owner or owners of such an interest or interests to himself, or he might petition the Court of Claims for an order under Sections 281 and 281-a of the Code, bringing in such owner or owners. To quote again from the Palmer case:³¹ "Ordinarily it would be assumed that the burden of satisfying the requirements of the statute rested on him who wished for action thereunder." This indicates that it is for the claimant to move under the sections referred to and to bring in other parties, unless he secures a release and assignment from them to himself. (§§ 20, 21, Court of Claims Act.)

3. *Releases.*

In case of lands appropriated for Barge Canal or terminal purposes, release and assignment should be in form like that shown in "Appendix XXII."

In case of lands appropriated for State or public park purposes, release and assignment should be in form like that shown in "Appendix XXIII."

30. 223 N. Y. 150, 5.

31. 223 N. Y. 150, 5.

B. WHEN NOT DAMAGES.

The distinction between an award for "property taken" and damages for "property injured" is pointed out by Judge Peckham in *re Clark v. Water Commissioners* (148 N. Y. 1, 8). An award for lands taken is frequently called "damages" but erroneously so. An award for damages to lands does not indicate a passing of title to the State but only an injury to the physical property. To call an award for lands taken "damages" immediately raises the question as to whether same is a substitute for the land or only compensation for some injury to the land.

C. AWARD IS PERSONAL PROPERTY.

"The award takes the place of land and is to be considered as realty for the purpose of determining to whom the same should be paid.³² By this is meant that the award should be made to the person or persons who own the land at the time of the appropriation. The award is not in fact realty.³³

"The award is personal property, into which the real property taken has been converted by operation of law. It represents the aggregate value of all the estates and interests in the real property acquired."³⁴

The *Tiffany Studios* case,³⁵ which was affirmed by the Court of Appeals in 223 N. Y. 712, is of particular interest as it covers various phases of the subject under consideration. Lands at the time of the condemnation thereof were held by the executors and trustees of an estate until a sale thereof. The executors were directed to collect the income and distribute same. In the event of a sale, the executors were directed to distribute the proceeds of such sale. It was contended by the executors that the condemnation was not a sale; that the award was real property and should be held and administered by them as such, only the income therefrom to be paid over to those entitled thereto. The court

32. *Tiffany Studios v. Seibert*, 178 A. D. 787, 94; 166 N. Y. Supp. 304; af. 223 N. Y. 712.

33. See *Matter of Field*, 182 A. D. 226; 169 N. Y. Supp. 677.

34. *Murphy v. Hirschman*, 168 A. D. 153; 153 N. Y. Supp. 849.

35. 178 A. D. 787, 94; 166 N. Y. Supp. 304; af. 223 N. Y. 712.

decided that the taking of the land constituted a sale of the property and operated as a purchase by the condemning party for the sum fixed by the Commissioners; that the award, when paid to and received by the executors and trustees, was personal property for purposes of distribution.

In *Ametrano v. Downs* (170 N. Y. 388), Judge Cullen held that a condemnation is an involuntary sale of land; that there is no difference between a voluntary and an involuntary sale with regard to the distribution of the proceeds. His decision (1902) was the first authority on the point in this State. He stated that "It is settled by a number of authorities that if the sale be made" * * * "in the lifetime of the intestate the proceeds are personalty and go to the next of kin, while if made after his death they are real estate and go to the heirs at law."

The distinction as stated is somewhat misleading and does not in fact exist. On the death of the intestate, title to his real estate becomes vested in his heirs at law. The sale is really made by the heirs at law. "The proceeds are personalty" the same as if made in the lifetime of the intestate. If the sale is made by the intestate, the proceeds go to his next of kin; if the sale is made by the heirs at law, the proceeds go to the next of kin of the heirs at law.

1. *Exception.*

Judge Cullen noted an exception to the rule where the property belongs to an infant or to an incompetent person. In such a case "the proceeds retain their original character of realty."

To treat an award "as land to ascertain and fix rights could not alter the real and existing fact, that it was proceeds of land already sold, and merely awaited distribution according to the antecedent rights and liens of those interested." ³⁶

D. PASS BY ASSIGNMENT ONLY.

The Rochester case, last cited, involved a fund paid into court as compensation for a water right taken by condemnation proceed-

36. See *Matter of City of Rochester*, 136 N. Y. 83, 90.

ings. At the time of the condemnation, the lands were covered by a mortgage; foreclosure proceedings were pending.

It was held that the land not affected by the condemnation could be sold and conveyed on the foreclosure; that as to the lands being condemned the right of the mortgagees became an equitable lien upon the award in the proceedings to the extent of any deficiency which the land sold and conveyed did not pay. The fund resulting from the condemnation did not pass by the referee's deed; the fund was not sold but remained in the hands of the court for distribution.

A claim resulting from an appropriation or condemnation is "a mere right of action not running with the land." Neither the claim nor the award will pass under a deed unless "specially assigned."³⁷

E. SUBJECT TO EASEMENTS.

Awards may be made to the owner of the fee subject to an easement right. In other words, the value of the fee is reduced by reason of the easement right and an award may be made accordingly. In some instances a fee may have only a nominal value or a very small value, depending upon the extent to which the easement right is or might be used and the possibility of use of the land by the fee owner.

If an award is made for lands in ignorance of an easement right, the award may be reduced by the Court of Claims on proof of the facts. This is frequently done by stipulation and order.

F. PART INTERESTS.

An award may be made for an undivided interest. One tenant in common may secure an award if his co-tenant does not join with him. In general, however, awards should be made for the land subject only to easement rights which may be more valuable than the land. If one person owns the land and another owns the trees growing thereon or the buildings erected thereon,

37. *Matter of Mayor*, 116 A. D. 252; 101 N. Y. Supp. 613.

To the same effect, see *Harris v. K. R. Co.*, 116 A. D. 704; 101 N. Y. Supp. 1104.

Matter of Leist, 189 A. D. 155; 178 N. Y. Supp. 268.

it is proper to make an award to each for the value of what each owns separate and distinct from the other. Such ownership is distinguishable from an ownership in common. One person may own the land, and all or a part thereof may be covered by a pond of water which also covers other lands, and which may have been created by a dam located on the land or on other lands. It then becomes necessary to determine the value of each and to make separate awards — one for the land taken, and the other for the water power destroyed. Other situations may be presented, each requiring specific consideration. As a general rule, one award should be made where interests are held in common and separate awards should be made where the rights are severable and may be separately appraised.

It has been held that no power exists in a surrogate to compute the value of a life estate without the consent of the life tenant.³⁸ In case the consent of the life tenant is given, the question arises as to whether a remainderman would be bound. This depends somewhat upon the application of Sections 1553 and 1569 of the Code of Civil Procedure, which provide for the determination of a gross sum and the payment or investment thereof.

G. INTEREST ON AWARDS.

The constitutional provision that just compensation shall be made for property appropriated requires the payment of interest from the time of the taking. In theory, payment should be made the moment the property is taken. Interest should be allowed by reason of a delay in payment occasioned by the necessity of filing a claim, proving the value, examining the title and determining the amount to be awarded. The award, when made, is made as of the day of the appropriation. It is immaterial that the property may be worth more or less at the time of the trial or when the amount awarded is finally fixed. The award should be the value of the property when taken, to which interest should be added as a matter of course unless the owner retained possession after

38. *Matter of Camp*, 126 N. Y. 377, 88.

CODE references. See Author's Note and Distribution Table — page xxiv.

the date of appropriation. As was stated in *Matter of Mayor*³⁹ (approved in *Matter of Mayor*):⁴⁰

“The true rule would be” * * * “as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be to pay the compensation with one hand whilst they apply the axe with the other; and this rule is departed from only because some time is necessary by the forms of law to conduct the inquiry.

“This is a clear statement of the true basis for that just compensation which the Constitution guarantees. Upon both principle and authority the property owners were entitled to the cash value of their lands upon the ninth day of January, 1895, and the obligation of the city to pay that cash value (when ascertained) as of that date then accrued. Upon that obligation the right of interest rests. If the property owners were then entitled to their money, they were equally entitled to its use or to the legal substitute for its use.”

“* * * But ‘no case can be found where the rule is laid down that the owner, pending a specific performance of a contract of purchase, is to have both the possession of the property, the value of its use and occupation, and interest upon the purchase price.’”

To be entitled to interest for the full period, the claimant should diligently prosecute his claim. He should not be permitted to delay an award because his claim is drawing interest at the rate of six per cent. To obviate the possibility, Section 284 was added to the Code in 1916. It provides that the Attorney General may notice a claim for trial and that when the claim is reached for trial by the Court of Claims, if the claimant is not ready to proceed to trial, interest shall not accrue or be allowed upon the

39. 40 A. D. 281; 58 N. Y. Supp. 58.

40. 150 A. D. 215, 8; 134 N. Y. Supp. 844.

claim between such date and the entry of judgment unless the court, in the exercise of its discretion, for good cause shown, shall otherwise determine. (Now §§ 18, 19, 24, Court of Claims Act).

H. TAXES NOT TO BE ADDED.

When title passes to the State on the date of appropriation, the owner is relieved from paying taxes levied after that date. And the State may not be liable for such taxes. If, however, the owner remains in possession and enjoyment of the property after the date of appropriation, and pays taxes, he would not be entitled to a refund from the State. The value of the use might be an equivalent of taxes and interest.⁴¹

I. DISBURSEMENTS ALLOWED.

In making an award, the question sometimes arises as to whether claimant is entitled to the cost of a search of the lands for the appropriation of or damage to which the claim was filed. The general rule was laid down by Judge Rodenbeck of the Court of Claims in *Brainard v. State* (74 Misc. 100). He held that reasonably necessary expenses form a part of the constitutional guarantee of just compensation. He allowed disbursements for abstract of title, printing claim, furnishing blue prints and tracing of maps, but not services of expert witnesses. (Page 126.)

A similar conclusion was reached by the Appellate Division in *Burchard v. State*.⁴²

J. DEPOSIT OF AWARDS.

Section 88 of the Canal Law, which had its origin in 1841, provided for the deposit of an award by the Comptroller, in a bank, whenever it appeared that there was a lien or incumbrance on property appropriated. Such award was to be paid and distributed to the persons entitled thereto as ordered by the Supreme Court.

Under this provision, the Comptroller designated a bank in

41. *Matter of Mayor*, 40 A. D. 281; 58 N. Y. Supp. 58.

42. 128 A. D. 750; 113 N. Y. Supp. 233; dis. 195 N. Y. 577.

Albany as a depository. Awards were deposited in such bank not only in case of a lien or incumbrance, but also where there were conflicting or outstanding claims. Of course, it was necessary, following the making of the award, to enter judgment in the Court of Claims before making the deposit.

The application of Section 88 of the Canal Law was considered by Judge Rodenbeck of the Court of Claims in *Moroney v. State*.⁴³ He held that a lease was an incumbrance, and that the value thereof must come out of the amount awarded for the land taken; that unless the owner of the lease and the owner of the fee were both parties to the claim before the Court of Claims, and unless consent was given to the fixing of the value of the lease by the court, the award must be deposited.

*People ex rel. Smith v. Sohmer*⁴⁴ involved the question of a marketable title to lands appropriated by the State. Claimant's title was defective in that it was subject to a contingent reminder on behalf of persons unborn. Held, that the award made by the Court of Claims was not for the value of claimant's interest in the lands appropriated but "the value of a marketable title to such lands." Claimant was not, therefore, legally entitled to receive the award, but he was entitled to have it deposited under Section 88 of the Canal Law.

By Chapter 730 of the Laws of 1917, Section 88 of the Canal Law was repealed. Section 268-a of the Code of Civil Procedure was substituted. It is broader than Section 88 of the Canal Law and covers not only liens and incumbrances but, also, adverse or conflicting claims or rights, the interest or ownership of which are indeterminable or unknown. It reads as follows:

§ 268a. Disposition of adverse and conflicting claims.

"If there are adverse and conflicting claims to the lands, structures, waters, franchises or any other property whatsoever lawfully appropriated by the state or an apparent lien or incumbrance on the property so appropriated or on any

⁴³. 67 Misc. 58; 124 N. Y. Supp. 824.

⁴⁴. 163 A. D. 830; 149 N. Y. Supp. 276; af. 215 N. Y. 709.

CODE references. See Author's Note and Distribution Table — page xxiv.

interest therein, or to the award therefor, unless the holders of such adverse or conflicting claims or the owner of such lien or incumbrance shall consent that their respective interests may be determined by the court of claims, or if the owners of any property so appropriated or of any interests therein are indeterminable or unknown, the court shall direct the comptroller to deposit the amount awarded in any bank, in which moneys belonging to the fund from which such compensation is payable may be deposited, to the account of such award, to be paid and distributed to the persons entitled to the same as ordered by the supreme court on application of any person."

In construing Section 88 of the Canal Law, the court in *N. Y. T. Co. v. State*,⁴⁵ observed that a deposit by the Comptroller "is permissive and not mandatory." The same observation does not apply to Section 268-a of the Code; "the court shall direct the comptroller to deposit."

The court in the *Sohmer* case⁴⁶ stated that the award should be "deposited by the Comptroller at interest in a bank." There was no provision in Section 88 of the Canal Law for interest and there is none in Section 268-a. Experience has taught that banks will not pay interest on such deposits, and refuse to accept same, if interest is required to be paid, for the reason that the length of time of deposit is so variable. If a situation is complicated, the bank naturally requires legal advice relative to the payment and distribution of the award, the cost of which may equal or exceed the value of the use of the money during the time of its deposit.

1. *Bond in Lieu of Deposit.*

The proposition to file a bond and thus obviate the necessity of a deposit is sometimes made by claimants. It is usually made to the Attorney General as an inducement for him to waive an

45. 169 A. D. 310, 20; 154 N. Y. Supp. 1059; *af.* 218 N. Y. 738.

46. 163 A. D. 830; 149 N. Y. Supp. 276; *af.* 215 N. Y. 709.

objection to title and permit payment of an award even though there may be an unreleased outstanding interest or the possibility of an outstanding claim, which if made might not be successfully defended by the State. The possibility of anyone making such a claim sometimes becomes an improbability, but the bond would not satisfy the claim. If the State should be compelled to pay for the outstanding interest after having paid for the property to one who did not own every right, title and interest in and to same, it might not be able to recover on the bond. Such a bond should not be taken and may afford no protection to the official accepting same, as there is no legislative authority for it. An official taking such a bond, or rather waiving a defect in consideration of the filing of such bond, may be personally liable in case the bond does not save the State from a double payment.

K. ORDER FOR JUDGMENT.

Following a trial and a determination by the Court of Claims of the amount to be awarded, the Judges of the Court of Claims, before whom trial was had, make findings of fact and conclusions of law by which the value of the premises appropriated and the amount which the State should pay therefor is fixed and determined. In case the amount of the claim and the proof offered in support thereof is not contested, the order for judgment is in form like "Appendix XXIV."

In case of a contest, or where the questions of fact are more complicated, the judges make specific findings of fact and conclusions of law suitable to the issues involved, similar to those found on a trial in the Supreme Court.

The order for judgment, signed by the Judges of the Court of Claims, is the authority for the clerk of the court to enter judgment.

Seventh. Title Objections.

The examination of title by the Attorney General usually discloses numerous title objections. Unpaid mortgages are commonly found; also mortgages claimed to be paid but not satisfied of record. Other liens appear as well as easement rights. The first thing to be determined, however, is the ownership, *i. e.*,

who is the fee owner; is the owner of record in fact the owner or is his deed void for some reason or has he lost title by adverse possession? Some of the questions and objections which arise merit discussion.

A. OWNERSHIP.

1. *Purchase by Guardian et al. Void.**

A deed cannot always be accepted and given full credit; for instance, a guardian of an infant shall not directly or indirectly purchase or be interested in the purchase of any property of the infant, sold as a result of court proceedings. If he does, the deed is void.⁴⁷

The validity of such a deed was considered in *McKean v. Hill*,⁴⁸ and title was held not to be marketable.

Although a conveyance may be made by a referee to an apparent stranger, if he immediately conveys to the guardian, it is sufficient to put one purchasing from the guardian on guard, as the guardian may have been indirectly interested; the stranger may have purchased for the benefit of the guardian and under an agreement to convey to the guardian.

The Code section cited (1679) is an enlargement of a section of the Revised Statutes (2 R. S. 326, § 58), which provided:

“Nor shall any guardian of any infant party in such suit, purchase, or be interested in the purchase of, any lands being the subject of such suit, except for the benefit or in behalf of such infant and all sales contrary to the provisions of this section shall be void.”

A sale by one occupying a fiduciary relation, to himself individually, is suspicious on its face. It may be regarded as equally suspicious where the sale is made to a third party who immediately conveys to the fiduciary.⁴⁹

* See also Weed's Practical Real Estate Law, p. 494.

47. Section 1679, Code of Civil Procedure; section 987, Civil Practice Act.

48. 166 A. D. 18; 151 N. Y. Supp. 689.

49. *Stevens v. Banta*, 47 Hun, 329.

The general rule forbidding guardians, trustees or persons in similar relations to deal for their own benefit with the property in which the *cestuis que trust* have an interest was expressed in *Toole v. McKiernan* (48 Super. Ct., 163).

The trustee is forbidden to buy. To quote from the opinion:

“Where the purchaser at such a sale re-conveys the property at once or within a brief period to the executor or trustee, the presumption is that he was used as a tool or cover, and the transaction will be set aside as a constructive, if not actual fraud. * * * And where the defect is apparent on the face of the record or title papers, a third person buying subsequently will be affected with notice and cannot hold the land. * * * The presumption may, however, be repelled and does not apply where it is made to appear with sufficient clearness that the purchaser bought for himself, and that there was no concert between him and the trustee.”

Where an executor conveyed to his two brothers, who immediately conveyed to him a one-third interest in the realty, the conveyance was held to be voidable. The doctrine of *caveat emptor* was held to apply to one purchasing from the brother who was also acting as executor. Twenty years has been named as the shortest period within which a court of equity would be bound to consider an absolute bar to the claim that the conveyance was voidable.⁵⁰

Even the confirmation of the report of sale will not render the purchase valid.⁵¹

The case of *Jefferson v. Bangs*⁵² involved a purchase by a guardian in socage. The purchase was held not to be void but voidable. Real property was devised to a daughter, subject to a mortgage which the father bought. On the foreclosure of the mortgage, the father purchased, being at the time the guardian in socage of the daughter. The title taken by the father was held to have been voidable. Had the daughter proceeded against her father, while he held title, the deed would have been declared

50. *Prentice v. Townsend*, 143 A. D. 151; 127 N. Y. Supp. 1006.

51. *O'Donoghue v. Boies*, 159 N. Y. 87, 102.

52. 197 N. Y. 35; 169 A. D. 102; 154 N. Y. Supp. 439; af. 226 N. Y. 612.

void. But when he conveyed to a *bona fide* purchaser for value, who had no actual or constructive notice of the rights of the ward, she was held not entitled to maintain a suit to recover the lands. Even the will under which the daughter took, and which was recorded in the Surrogate's office, was held to give no notice to the purchaser, for the reason that the purchaser was not required to search in the Surrogate's office for wills affecting real estate.

2. *Void Foreclosure.**

A purchaser at a foreclosure sale acquires no title if the owners of the equity of redemption have not been served with process or do not voluntarily appear. If jurisdiction over the owners is not secured, a judgment of foreclosure does not bind them.⁵³

This case illustrates the necessity of examining every foreclosure proceeding in the chain of title. If all of the jurisdictional steps have not been taken, the foreclosure may be void and no title may pass by virtue of the referee's deed. If a mortgagor is dead, his heirs should be made parties. In case the mortgagor has sold and his grantee has died prior to the foreclosure, the heirs of the grantee should be made parties. Even the fact that the mortgagee is in possession does not give him any greater right unless he entered with the mortgagee's consent or the entry was otherwise lawful.⁵⁴

3. *Sale of Decedent's Property.*

A proceeding for the sale or mortgaging of the real property of a decedent must be carefully examined for the reason that it is a statutory proceeding and must be strictly followed. For instance, an omission to serve a citation upon all the creditors makes the proceeding void.⁵⁵

4. *Person Out of Possession.*

Although adverse possession cannot ripen into a title until twenty years have elapsed since the possession became adverse,

* See also Weed's Practical Real Estate Law, p. 505.

53. *Hermann v. C. L. Co.*, 217 N. Y. 526.

54. *Hermann v. C. L. Co.*, 217 N. Y. 526.

55. *Matter of Reed*, 214 N. Y. 383.

it was held in *Ford v. Clendenin* (215 N. Y. 10) that a person claiming title to real property but not in possession thereof must act affirmatively within ten years. One claiming to own real property in the possession of another, who seeks *by an action in equity* to obtain a judgment, which will enable him to obtain possession of the property must bring his action within ten years after the cause of action accrues or he will not succeed. If an examination of the records does not disclose any action of the kind mentioned within ten years and the property is and has been otherwise occupied for ten years, the possibility of such an outstanding claim, which may be successfully prosecuted, is greatly reduced.

5. *Person in Possession.**

The rights of a person in possession for seven years without a deed were considered in *I. S. B. v. LeGrange*.⁵⁶ A purchaser by contract entered upon a lot, built a fence, graded, planted shrubs and trees and placed building stones on the lot. Held, that his rights could not be ignored and that his acts amounted to notice to a purchaser from the record owner.⁵⁷

6. *Mortgagee in Possession.†*

The rights of a mortgagee in possession may arise in cases where mortgages have not been foreclosed, in other cases, where foreclosure proceedings have been started, and in still other cases, where a foreclosure proceeding is defective.

A mortgagee, as such, or his assignee, has no right to take possession of lands mortgaged without the consent of the mortgagor or his grantee.

If a mortgagee takes possession with the consent of the mortgagor, he acquires no title unless his possession be long continued, in which event he may.

56. 169 A. D. 120; 154 N. Y. Supp. 814.

* See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 24, p. 734; Bk. 28, p. 1096.

Weed's Practical Real Estate Law, p. 53.

57. See also *Brown v. Volkening*, 64 N. Y. 76.

† See also Weed's Practical Real Estate Law, p. 775.

If a mortgagee takes possession without the consent of the mortgagor, he becomes a trespasser.⁵⁸

By taking possession as a mortgagee, and not under claim of title, without the consent of the mortgagor, the mortgagee becomes a continuous trespasser and cannot thereby predicate a claim of title by adverse possession.

If a mortgagee in possession, whether with or without the consent of the mortgagor, gives a deed of the lands, the grantee may base a claim of title thereon by twenty years continuous adverse possession. The entry must be made under a claim of title. If made under a mortgage or as a mortgagee, with such consent as to make it lawful, continued possession would not create a title by adverse possession.⁵⁹

A mortgagee in possession can retain the premises until his mortgage has been paid and no longer. He is liable to account for the rents and profits which, during a period of years, may be sufficient to discharge the mortgage.⁶⁰

If a mortgagee secures lawful possession, he cannot be ejected unless the mortgagor redeems the property by paying the mortgage or any balance found upon an accounting of the rents and profits. Where the mortgagee has been in possession for a long lapse of time, the consent of the mortgagor may be implied.

Continuous possession by a mortgagee for twenty years may bar an action to redeem from the mortgage and may in effect vest an absolute title in the possessor.⁶¹

It is thus evident that claims of title based on a mortgage or a sale following a void foreclosure should be examined with extreme care.

7. *Actual or Constructive Possession.*

The terms "actual possession" and "constructive possession" have been defined by the Court of Appeals. "Actual possession, as a legal phrase, is put in opposition to the other phrase, posses-

58. *Hermann v. C. L. Co.*, 217 N. Y. 526.

59. See *Townshend v. Thomson*, 139 N. Y. 152.

60. *Sutherland v. City of Brooklyn*, 87 Hun, 82; 33 N. Y. Supp. 959.

61. *Becker v. McCrea*, 48 Misc. 341; 94 N. Y. Supp. 20.

sion in law, or constructive possession." Actual possession means actual entry, a possession in fact, a standing upon or an occupation of land as a real demonstrative act. It is the contrary of a possession in law. A possession in law "follows in the wake of title, and is called constructive possession."⁶²

There can be no constructive possession without title.⁶³

The legal title must precede constructive possession.⁶⁴

8. *Rights of Unborn.**

While title is acquired through a death and descent, the possibility of unborn children, *i. e.*, children born after the death of decedent, should be investigated. The rights of such unborn children may be the same as those born before the death of the ancestor. The subject was considered by Judge Earl in *Kent v. Church* (136 N. Y. 10).

9. *By One Without Power to Take and Convey.*

Although a corporation may be without power to take, hold and convey real property, if it does take a deed, the grantor to it is divested of title. "Neither the grantor nor his heirs nor third persons can impung it upon the ground that the grantee has exceeded its powers."

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding, instituted for that purpose. * * * This rule * * * has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result."⁶⁵

62. *Churchill v. Onderdonk*, 59 N. Y. 134.

63. *M. M. Co. v. W. R. Co.*, 142 N. Y. Supp. 1094.

64. *Vanderveer Crossings v. Rapalje*, 133 A. D. 203; 117 N. Y. Supp. 485.

* See also *Weed's Practical Real Estate Law*, p. 1192.

Schouler on Wills, 5th Ed.

65. *Kerfoot v. F. & M. Bank*, 218 U. S. 281.

B. ADVERSE POSSESSION.*

1. *Generally.*

It frequently happens that a person in possession has no record title, or that his immediate grantor or a prior grantor had no record title. An exclusive occupation and possession of lands under a claim of title for a period of twenty years may make the rights of the one enjoying such possession and occupation as effectual as a continuous record chain of title from the original patentee to the person presently claiming. Sections 368 to 372, inclusive, of the Code of Civil Procedure define what constitutes adverse possession. It was said in *Sherman v. Kane* (86 N. Y. 57, at page 65) that "a title by adverse possession is equally strong as one obtained by grant."

The true owner is sometimes considered to be in constructive possession of land, although another may be in actual possession. The true owner would not lose his right to actual possession unless there had been a twenty years adverse user. But it was stated in *Archibald v. N. Y. C. & H. R. R. R. Co.* (157 N. Y. 574, 83) that

"The settled principles of law require courts to consider the true owner as constructively in possession of the land to which he holds the title, unless they are in the actual hostile occupation of another under a claim of title; and this rule is still more imperative in the case of wild and uncultivated tracts or lands which are not legally susceptible of actual occupation and cultivation. * * * This possession is deemed to continue until there is an actual disseizin and expulsion of the true owner from the land, and when such dispossession terminates, if it does terminate within twenty years, the possession is, by construction of law, considered as having again returned to him who holds the legal title."

The distinction rests on the character of the actual possession by one other than the owner. If it be lawful, the true owner re-

* See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 5, p. 258, color of title.

Weed's Practical Real Estate Law, p. 53.

Wood on Limitations, 4th Ed., pp. 7, 1218.

CODE references. See Author's Note and Distribution Table — page xxiv.

mains in constructive possession. If it be unlawful and "hostile," *i. e.*, adverse, the true owners constructive possession is in abeyance.

One holding a title by adverse possession may lose it by a later twenty year adverse possession.

Where the last conveyance in the chain of title is dated more than twenty years ago and the lands are not actually possessed, the question arises as to whether in the meantime they might not have been adversely possessed for a period of twenty years thereby in effect transferring the title from the record owner to such possessor. If so adversely possessed, such possessor may be the true owner and in constructive possession.

A much litigated case of adverse possession is that of *Green v. Horn*.⁶⁶ The record shows five trials and five appeals. The plaintiff had the record title and the defendant claimed title by adverse possession. Plaintiff succeeded; defendant's claim of title by adverse possession was not sustained, even though his evidence tended to show an enclosure of the premises by a fence, the digging of a cellar and the moving of a building thereon. It was held that a naked possession unaccompanied by evidence as to its origin, will be deemed unlawful and in subordination of the title.

Another recent case of interest is that of *Smith v. Smith*,⁶⁷ three judges sustaining a claim of title by adverse possession and two judges dissenting. The possession on the one hand and the record title on the other dated back to 1863. The hostility of the possession in its inception was one of the main points in issue. The claim of title by the one in possession must never be denied. "A single lisp of acknowledgment" of title in another will defeat the possessor's claim.

There must also be shown, in addition to actual open and notorious possession for more than twenty years, a claim of title adverse to the true owner.⁶⁸ Where such claim of title is founded upon a written instrument, the instrument should be examined and the effect thereof given consideration. If the instrument does not

66. 165 A. D. 743; 151 N. Y. Supp. 215; *af.* 222 N. Y. 568.

67. 177 A. D. 218; 163 N. Y. Supp. 863; *af.* without opinion, 226 N. Y. 647.

68. *Meighan v. Rohe*, 166 A. D. 175; 151 N. Y. Supp. 785.

Matter of Dept. of Public Parks, 53 Hun, 556, 61.

purport to grant a fee, or if it grants some specific interest less than a fee, no greater right can be secured by reason of the possession than that specified by the terms of the instrument.⁶⁹

A "title gained by adverse possession rests upon the laches of the real owner, who fails to assert his title against the one claiming adversely."⁷⁰

One of three things is necessary to establish title by adverse possession, namely:

A substantial enclosure, or
Cultivation, or
Improvement.⁷¹

The provision of law requiring an improvement or cultivation is not satisfied when one claiming by adverse possession builds no fence or enclosure for the protection of the land or does not cultivate the land. The cutting and removal of timber alone or the use of the lands as a sugar bush and the tapping of trees and taking sap therefrom is not a cultivation or improvement within the contemplation of the provisions requiring same.

"Reaping alone can scarcely be considered as cultivating;" neither can the mowing of grass or doing anything not designed to improve the land, be considered an improvement within the meaning of the statute.⁷²

Claims of title by adverse possession arise so frequently and so much litigation has resulted that volumes could easily be written on the subject. The uncertainty of titles by adverse possession and the disfavor in which they are held by the courts, was expressed in *C. P. A. v. Gouraud* (224 N. Y. 343, 50).

A more recent decision of the Court of Appeals is to the effect that adverse possession although not a favored method of procuring

69. *Duryee v. Mayor*, 96 N. Y. 477, 98.

Sanders v. Riedinger, 30 A. D. 277; 51 N. Y. Supp. 937; af. 164 N. Y. 564.

70. *Berger v. Horsfield*, 188 A. D. 649, 53.

71. See *Sanders v. Riedinger*, 30 A. D. 277; 51 N. Y. Supp. 937; af. 164 N. Y. 564.

72. *Voight v. Meyer*, 42 A. D. 350; 59 N. Y. Supp. 70.

title, is a recognized one and a necessary means of clearing disputed titles. Five essential elements were held to be necessary to constitute an effective adverse possession:

- (a) The possession must be hostile and under claim of right;
- (b) It must be actual;
- (c) It must be open and notorious;
- (d) It must be exclusive;
- (e) It must be continuous.

If anyone of these constituents is wanting, the possession will not bar the claim of the legal owner.⁷³

2. *As Between Tenants in Common.**

The question of title by adverse possession as between tenants in common presents greater difficulties.

One tenant in common is entitled to the possession of the premises. Although each tenant in common is entitled to possession, the one out of possession cannot maintain an action against the one in possession. The one in possession is presumed to hold lawfully. The basis of a title by adverse possession is an unlawful and not a lawful entry.⁷⁴

As adverse possession is a question of fact, the Appellate Courts are not likely to reverse. This was the conclusion reached in *Berger v. Horsfield* (188 A. D. 649). The owners of the undivided three-fourths interest were in actual possession since 1834. The owners of the other undivided one-fourth interest were not in possession. Yet the court held that the owners of the undivided one-fourth interest had not lost their title.

One tenant in common may have so occupied the premises under a claim of title as to defeat a claim of his co-tenant. Likewise,

73. *Belotti v. Biekhardt*, 228 N. Y. 296.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 13, p. 303. Weed's Practical Real Estate Law, p. 71.

74. See *C. W. Co. v. Brunner*, 175 A. D. 153; 161 N. Y. Supp. 794. *Wilsey v. Loveland*, 180 A. D. 279; 167 N. Y. Supp. 546.

one tenant in common may by a conveyance of the premises and not of an undivided interest therein, place his grantee in a position where the grantee may by an exclusive possession under claim of title for twenty years cut off the rights of the tenant in common who did not join in the grantor's deed.⁷⁵

3. *By Life Tenant.*

As a life tenant is lawfully in possession and as he can convey his interest and give to his grantee a right of possession, neither the possession of the life tenant nor of his grantee can be adverse to that of the remaindermen.⁷⁶

4. *Occupation by Sufferance, not Adverse.*

A possession never becomes adverse when the occupation is by the sufferance of the owners and without any claim of right on the part of the users. A mere toleration on the part of an owner permitting another to use or occupy his lands does not create a prescriptive right. This principle was discussed at length in *C. W. Co. v. Brunner*.⁷⁷

5. *Against Municipality.**

Where the City of New York owned lands which were adversely held by an individual for more than twenty years, it was held that the individual secured title by prescription.⁷⁸

Lands claimed by a village under a deed dated in 1851 were held and claimed adversely by another under a chain of title starting in 1853 from the same grantor. Held, that although the deed of 1853 conveyed no title, the occupation under it was such as to preclude the village from succeeding in an action in ejectment. Although not cultivated or improved, the land was used for busi-

75. *Hamerslag v. Duryea*, 58 A. D. 288; 68 N. Y. Supp. 1061; *af. 172 N. Y. 622*, no opinion.

76. *Jefferson v. Bangs*, 197 N. Y. 35.

77. 175 A. D. 153; 161 N. Y. Supp. 794.

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 21, p. 550. Weed's Practical Real Estate Law, p. 67.

78. *Matter of City of New York*, 217 N. Y. 1, 13.

ness purposes under such circumstances as to constitute notice and knowledge of the hostile claim of the one in possession. Under such circumstances, those claiming under the deed of 1851 were called upon to assert their legal title; they could "not sit supinely by for nearly forty years, raising no question as to the claim" of those in occupation.⁷⁹

6. *Payment of Taxes.**

Where one claims title to lands by reason of an alleged possession adverse to the true owner, proof of payment of taxes is not evidence of such possession. Payment of taxes is not evidence of possession, actual or constructive, although it has been regarded as an act showing a claim of title. Proof of payment of taxes may be competent if there is a controversy with respect to the nature of the claim of title.⁸⁰

In *Consolidated Ice Co. v. Mayor* (166 N. Y. 92, 101), it was stated that:

"It is the settled law in this State that the payment of taxes is no evidence of possession, actual or constructive."

7. *Boundary Lines and Fences.†*

As many descriptions bound the lands of one person by the lands of another, it becomes essential to locate the actual boundary line. This is sometimes fixed by agreement between the respective property owners and sometimes may be found of record. In other instances, the line is established by a practical location and the assent of both parties to such location. The true boundary line may be established by a fence which has been treated as the boundary line between two properties. "The doctrine as to the practical location of a boundary line is well settled in the courts. It was adopted as a rule of repose with a view of quieting titles and rests upon the same ground as the statute in reference to adverse possession." * * *

⁷⁹ *Village of Manchester v. Post*, 97 Misc. 451, 161 N. Y. Supp. 371.

* See also *Weed's Practical Real Estate Law*, p. 60.

⁸⁰ *Archibald v. N. Y. C. R. R. Co.*, 157 N. Y. 574, 83.

† See also *NORE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 29, p. 1083; Bk. 4, p. 106; Bk. 4, p. 108.

“ It applies not only to cases of disputed boundary but to those about which there can be no real question.” * * * “ Even although the party maintaining the fence holds under a paper title which recognized a different line, the existence of such title does not necessarily destroy the effect of the line which had been recognized for a long period of time.” ⁸¹

The question of whether the fence is located on a line other than that called for by the conveyance is one of fact. The intention of the parties may be shown and it may appear that the fence was not erected and maintained with the idea of changing the property line as indicated by the conveyance.

Where the location of the true boundary line is uncertain, the only safe practice is to secure a boundary line agreement, executed by the owners of both parcels.

A boundary fence between two city lots two feet from the line of the lots as such line appears upon a map according to which the lots were conveyed, was held to be the true boundary line, where the fence had existed for forty years and had been recognized as the boundary line during that time.⁸²

8. *Driveway in Common.*

Common driveways exist for the use of property on either side thereof, especially in cities and villages. In some instances, the fee of the land is owned by the owner of the lot on one side or the other and in other instances each lot owner may own a portion of the fee within the driveway.

In such cases, the location of the true boundary line is often lost sight of. Such a situation arose between two lot owners. For half a century, there had been a driveway between their properties which had been used in common by the owners of the two properties without any question being raised as to the title or as to the right to the common use of the driveway. It was found that each of the owners of the adjoining lots owned some portion of the driveway but that both parties had an easement in the entire driveway which neither could deny. The right to use

81. *Sherman v. Kane*, 86 N. Y. 57, 72.

82. *Granada v. D'Allesandro*, 96 Misc. 468; 160 N. Y. Supp. 602.

the driveway in common would pass as an appurtenance with a deed conveying either lot.⁸³

9. *Easements by Prescription.**

The taking of water from a brook by means of a pipe and the open adverse user of such water may establish a prescriptive right to same, and the perpetual right to continue such taking.

The amount of water to which one acquires such a right by prescription does not depend upon the purpose for which the water is used. If the prescriptive right is established the same quantity of water may be taken although used for another purpose.⁸⁴

(a) Abandonment.

The case last cited on the authority of *Welsh v. Taylor* (134 N. Y. 450), holds that the non-user of water to the use of which a prescriptive right has been acquired does not constitute an abandonment of the easement right.

C. DEEDS.

1. *Delivery to Third Person.†*

The rule governing the delivery of a deed to someone other than the grantee was set forth in detail in *Saltzsieder v. Saltzsieder* (219 N. Y. 523):

“It is an established rule of law that where the owner of land delivers an instrument, competent in form to grant the land, to a third person, with directions to the third person to hold it during the lifetime of the owner and to deliver it to the person as grantee upon the owner’s death, the owner then and there intending to part forever and absolutely with all right to withdraw, cancel or control the instrument, the owner delivers the instrument as his deed and is immediately

83. *Benedict v. Myers*, 173 A. D. 550; 159 N. Y. Supp. 1018

* See also *Weed’s Practical Real Estate Law*, p. 68.

84. *C. V. R. & G. C. v. Burns*, 105 Misc. 739, 173 N. Y. Supp. 577; *af. 186 A. D. 961*.

† See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 27, p. 279.

and irrevocably bound by the provisions contained in it. Ignorance on the part of the person named as grantee of the transaction does not affect the rule. His acceptance, to the extent of making inflexible the intention and delivery of the owner, is presumed." * * * "The evidence must show that the owner intended in the delivery to divest himself of his right to withdraw, revoke or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention. Whether or not the intention existed and was expressed is a question of fact solvable by a consideration of the other facts."

The general rule stated in the *Saltzsieder* case was not followed by the court on account of the peculiar facts in controversy. It was held that under the facts the deed was void and no title passed.

It is to be noted that the deed may take effect as of the date of delivery to the third person, the third person acting as the agent or trustee of the grantee, or the deed may take effect as of the date of final delivery to the grantee, the third person acting as the agent or trustee of the grantor.

Slowey v. Hunt (108 Misc. 222), is an instance where the court followed the general rule laid down in the *Saltzsieder* case and held that a deed to two daughters delivered to a third person took effect at the time of the delivery of the deed to the third person.⁸⁵

2. *Conveyances by Infants.**

There is always the possibility that a deed or mortgage in a chain of title might have been executed by an infant and that the infant might disaffirm unless he has arrived at his majority and is estopped by his failure to disaffirm. A case in point is one where a deed was made to an infant who during infancy conveyed to another; the grantee from the infant mortgaged the property;

⁸⁵. See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 21, p. 1068, as to when a recording will be deemed a delivery.

* See also Weed's Practical Real Estate Law, p. 596.

a foreclosure suit was brought and the infant elected to disaffirm the deed from the infant and asked that the deed and mortgage be annulled and cancelled.⁸⁶

(a) By Guardian for Infant.*

If one dealing with the property of an infant does not describe himself "as guardian," etc., it may be deemed his individual act. Adding to his name the words "guardian," etc., does not make it his representative act.⁸⁷

3. *Covenant to Build Fences.*

In the early days of railroad construction, many of the owners of lands granted to railroad companies for right of way purposes, covenanted and agreed to build and maintain fences along such right of way. It has been held that these covenants ran with the land and became a charge upon the land adjoining the right of way. The State in appropriating such lands adjoining a railroad right of way takes same charged with the covenant. A claim results in favor of the railroad company, if the State by so appropriating desires to be relieved of the duty of maintaining the fence. In any event, the owner of such lands is entitled to the value thereof, subject to such covenant. In instances where the State appropriates only a narrow strip along the railroad right of way, the value of such strip might be less than an obligation resulting from such covenant. Even the entire value of the land taken by the State might not satisfy the owner's obligation to maintain the fence, *i. e.*, the cost of maintaining the fence might exceed the value of the land taken by the State. In such a case, the owner would not be entitled to any compensation for the land taken. The railroad company may be entitled to the entire value of the land appropriated. The covenant may still attach to the adjoining lands not appropriated to cover any deficiency remaining after

86. *Oneida County Savings Bank v. Saunders*, 179 A. D. 282; 166 N. Y. Supp. 280.

* See also *Weed's Practical Real Estate Law*, p. 560.

87. See *Kmetz v. DeRone*, 183 A. D. 736; 171 N. Y. Supp. 73, and later citations.

applying the value of the land appropriated to the cost of maintaining the fence.⁸⁸

4. *Reservation, Exception, Condition.**

It is not an uncommon thing to find an exception and reservation of trees, bark, minerals or other property, in deeds conveying lands upon which same are located; also, of a right of way for the purpose of taking same away. The thing itself may be excepted and title thereto not pass under the deed or some right may be reserved.

The question is frequently presented as to whether property excepted and the right to remove same has been lost through lapse of time. If a time within which to remove is specifically stated in the conveyance, all rights expire with the expiration of the term. In case no time limit is expressed, the one having the right of entry and removal must exercise same within a reasonable time. This would depend upon the facts of each case, such as the quantity to be removed, the extent of the land, the natural impediments to be overcome in making removal and any other attending circumstances. Conflicts have arisen and litigation has resulted fifty years after an exception and reservation has been made. A case of unusual interest is *Decker v. Hunt*.⁸⁹

(a) For Third Party Void.†

A reservation or exception to a third person, not a party to the deed, is void. The same is true as to a condition in favor of a stranger to a deed. These principles and others relative to prohibitions and reservations contained in deeds were set forth in *Craig v. Wells* (11 N. Y. 315).

Judge Cullen delivering the opinion of the court in *Beardslee v. N. B. L. & P. Co.* (207 N. Y. 34), stated that it is elementary

88. See *Bell v. Erie R. R. Co.*, 183 A. D. 608; 171 N. Y. Supp. 341.

* See also *Weed's Practical Real Estate Law*, p. 451; p. 202.

89. 111 A. D. 821; 98 N. Y. Supp. 174.

See also *Boisaubin v. Reed*, 1 Abb. Ct. Ap. Dec. 161.

Kellam v. McKinstry, 69 N. Y. 264.

† See also *Weed's Practical Real Estate Law*, p. 452.

law that a reservation or exception in favor of a stranger to a conveyance is void or inoperative. He also pointed out the distinction between a reservation and an exception.⁹⁰

The rule was held not to apply in a case where the grantee was not the real party in interest or where the consideration was paid by a third party.⁹¹

5. *Restriction and Prohibition.**

A valid restriction of the use of property conveyed may be imposed by covenant on the part of the grantee in the nature of a condition. A naked prohibition as to the use of property granted inconsistent with the title conveyed is void. Thus, it was held that a provision in a deed which prohibited the grantee from carrying on a certain business on the lands granted was inoperative.⁹²

If the prohibition is expressed as a condition, it is valid. The condition may be complied with by the construction of a building as required by the terms of the grant. If there is no requirement that the building be maintained indefinitely, to be used for the purposes defined and as required by the condition, it may be later used for other purposes. In *Baumert v. Malkin*,⁹³ a restrictive covenant required the building of a private dwelling. It was held that the building need not be used as such for all time but that the use thereof as a school of music was not a violation of the covenant.

A covenant may have a two-fold aspect. There may be a duty to build and a duty to maintain. There may be a negative duty to refrain from a prohibited use. That duty runs with the land and charges all who take the land with knowledge of its terms.⁹⁴

Such restrictions and prohibitions would affect the value of lands as to which they applied.

90. See also *Tuscarora Club v. Brown*, 215 N. Y. 543.

91. *Nield v. Jupiter*, 175 A. D. 732; 162 N. Y. Supp. 465; af. 226 N. Y. 594.

* See also *Weed's Practical Real Estate Law*, p. 947.

92. *Craig v. Wells*, 11 N. Y. 315.

93. 189 A. D. 858; 179 N. Y. Supp. 402.

94. *Booth v. Knipe*, 225 N. Y. 390.

6. *Power of Attorney.**

When deeds are executed by an attorney in fact, the existence of the power of attorney may become very material. The power is necessarily contained in a separate instrument separately acknowledged. It was held in *Goodhue v. Cameron*,⁹⁵ that if a power of attorney is not produced and no proof given that it ever existed, the execution of a valid power of attorney will be presumed in favor of an ancient deed purporting to be executed by an attorney in fact. In that case, a conveyance more than thirty years old was treated as an ancient deed.

7. *Lost Deeds.*

There is sometimes a missing link in the chain of title when a deed has not been recorded. If the original deed cannot be produced and if same has been lost, it may be possible to compel a new deed from the grantors or the representatives of the grantors. An action in equity is maintainable to compel the execution of another deed, so that the grantee may be clothed with the record title.⁹⁶

As to whether a deed has been lost or not, was involved in *Sanders v. Riedinger*.⁹⁷ It is a question of fact.

D. WILLS.

1. *Construction of.†*

The courts have promulgated various rules relative to the interpretation and construction of wills. The language of a particular will may be the same or practically the same as that already construed by the courts or it may vary sufficiently to create a doubt. In certain instances, either one of two rules may apply, each con-

* See also *Weed's Practical Real Estate Law*, p. 107.

95. 142 A. D. 470; 127 N. Y. Supp. 120.

96. *Kent v. Church*, 136 N. Y. 10.

97. 30 A. D. 277, 84; 51 N. Y. Supp. 937; *af.* 164 N. Y. 564.

† See also *Weed's Practical Real Estate Law*, p. 1251, 9.
Schouler's Law of Wills and Administration.

flicting with the other, which makes it impossible to adopt either with any degree of certainty and safety. These difficulties were recognized by the Court of Appeals when it stated that "an authority upon the language of one will furnishes little aid toward the construction of another."⁹⁸

"Each will must be read and considered with reference to its peculiar provisions and to the circumstances attendant upon its making, and precedents are, rarely, of avail."⁹⁹

The most general rule in the construction of wills is to find out what the testator meant to do with his property after his death; to seek the plan in the mind of the testator and to construe the will so as to give such plan effect; if the intentions of the testator can be discovered from the language of the will and if they can be legally carried out, they should be.¹⁰⁰

The intention of the testator is to be sought in all of his words and when ascertained is to prevail.¹

The Attorney General but expresses his opinion in construing a will; the courts might not agree with his construction.

2. *How Executed.**

The manner of execution of a will and the probate thereof is of importance, as well as all proceedings in connection with the probate of a will. This is especially true with reference to wills executed without the State.

Section 22-a of the Decedent Estate Law provides that a will executed without the State in the mode prescribed by the law of the place where executed or of the testator's domicile shall be deemed to be legally executed and shall be of the same force and effect as if executed in the mode prescribed by the laws of this State.²

98. *Quackenbos v. Kingsland*, 102 N. Y. 128, 32.

99. *Central Trust Co. v. Egleston*, 185 N. Y. 23, 29.

100. *Central Trust Co. v. Egleston*, 185 N. Y. 23.

1. *Matter of Buechner*, 226 N. Y. 440.

Matter of Durant, 231 N. Y. 41.

* See also *Weed's Practical Real Estate Law*, p. 1265.

Schouler's Law of Wills and Administration.

2. Chapter 294, Laws of 1919.

3. *Power of Sale — Trusts.**

Notwithstanding a devise of a specific parcel of land to two or more devisees, if a will contains a power of sale to be exercised by an executor, a deed from one of such devisees would be ineffectual. Without the concurrent action by all of the devisees, one devisee could not elect to take the land and discharge the power of sale.³

A power of sale may be terminated by the united action of the beneficiaries.⁴

The intention of the testator may be so expressed as to make it necessary for two executors who are invested with a power of sale to exercise that power; a conveyance by one may be insufficient.⁵

Where a power of sale is given to two or more executors or trustees and one resigns or is removed before the power has been fully executed, the remaining executors or trustees may execute the power and convey a good title. This question appears to have been decided for the first time in this State by the Appellate Division of the First Department.⁶

If land is devised to executors in trust, with a power of sale, it may work an equitable conversion so that the land will be treated as personal property. The executor would take the title together with the power of sale; or, in other words, he would hold the title with full power to convey same.⁷

Neither the trustee, the *cestui que trust*, remaindermen in fee, nor the courts of this State, acting separately or in conjunction, have power to destroy a trust.⁸

A power of sale vested in a trustee cannot be exercised by him

* See also Weed's Practical Real Estate Law, p. 841; p. 1160.

3. *Matter of Fagan*, 166 A. D. 244.

4. *VanCott v. VanCott*, 167 A. D. 694, 9; 152 N. Y. Supp. 840; af. 219 N. Y. 673.

5. *Marsh v. C. P. B. Co.*, 220 N. Y. 205.

6. *Striker v. Daly*, 175 A. D. 620; 162 N. Y. Supp. 527; af. 223 N. Y. 468.

7. *Kelsey v. McTigue*, 171 A. D. 877; 157 N. Y. Supp. 730.

8. *Matter of Wentworth*, 190 A. D. 829; 181 N. Y. Supp. 442.

after the death of the sole beneficiary of the trust estate. This is true even though there may be debts existing against the estate.⁹

In determining the question of who is entitled to the award for lands appropriated, it appears that one who has a naked power to sell has no right to the award. He must in addition to the power have some right to the possession of the money either for the purposes of administration of the estate of the decedent or as trustee under his will.¹⁰

4. *Life Tenant — Remainderman.**

A will may leave real property to one for life and on his death to others. If so, the question arises as to the proper distribution of an award between the life tenant and the remaindermen, unless a division is agreed upon between them or unless one releases to the other. The life tenant would be entitled to the income for his life. The remaindermen would not be entitled to the principal fund until the death of the life tenant. In the meantime, the fund should be so held or invested as to provide an income for the benefit of the life tenant and at the same time secure the remaindermen so that the principal might be delivered to them on the death of the life tenant. The State would not be protected in paying the principal to the life tenant without securing the remaindermen. An award in which both a life tenant and a remainderman are interested might be deposited in court to be distributed or invested as ordered by the Supreme Court.¹¹

A legatee to whom a bequest is made for life with remainder to another after the death of the legatee, has been held to be entitled to the possession, control and management of the property bequeathed upon giving adequate security for the payment and delivery of the corpus of the estate to the remainderman.¹²

9. *Matter of Toplitz*, 109 Misc. 401; 179 N. Y. Supp. 876.

10. *Cashman v. Wood*, 6 Hun, 520.

* See also *Weed's Practical Real Estate Law*, p. 687; p. 939.

11. See Code, Section 268-b; Court of Claims Act, Section 28-a.

12. *Matter of Colwell*, 181 A. D. 408; 168 N. Y. Supp. 812.

(a) Tenant by Curtesy.*

An instance of a taking by a municipality of land formerly owned by a married woman who died intestate leaving a husband and infant children is reported in 126 N. Y. 377. (Matter of Petition of Camp.) The husband was appointed guardian of the children and the entire award was paid to him and receipted for by him as guardian. He was entitled to the interest on the fund during his life as tenant by curtesy and held the fund as guardian for the infant children. The husband invested the fund and lost it, but the children were protected by the statutory bond which their father had given as guardian.

5. *Vesting of Estates.*

It often becomes necessary to determine whether an estate has vested and whether the persons who will ultimately take are presently ascertainable. It is a well settled rule that if futurity is annexed to the substance of a gift, the vesting of title is suspended; if the gift is absolute and the time for payment only is postponed, title vests at once.¹³

Where a testator gave his estate to his wife until such time as she might remarry, with remainder over to another, it has been held that although she did not remarry, the remainderman would take on her death. The death of the wife was held to be equivalent to a remarriage, so far as fixing the rights of the remainderman was concerned, and the time of the vesting of the estate in the remainderman.¹⁴

A case of unusual interest involved a will of one-half to decedent's mother and the other one-half to decedent's wife. It was provided, however, that if the mother should not use up, spend or give away her one-half, the amount undisposed of by her should belong to the wife. It was held in Matter of Ithaca Trust Co.,¹⁵ that the mother had complete power of disposition of her one-half

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 37, p. 706. Weed's Practical Real Estate Law, p. 271.

13. Fulton Trust Co. v. Phillips, 218 N. Y. 573.

14. Matter of Schriever, 221 N. Y. 268.

15. 176 A. D. 40; 162 N. Y. Supp. 355.

and that she could dispose of it by will, although no case in point had been found.

The Court of Appeals¹⁶ reversed and held that the mother had power of disposition in her lifetime, excepting that she had no power to dispose by will; that on the death of the mother, title to land not sold by her, vested in the wife.

6. *Suspension of Alienation.**

A will should always be examined for the purpose of ascertaining whether it suspends the power of alienation beyond two lives in being. A devise of the use of land to testator's three daughters for their lives and to the survivor of them, and after their deaths, in fee to another, was held to be void as in violation of the statute.¹⁷

A division of the land into three parts and a devise of the use of each part to each of the three daughters, respectively, would have been valid.

An interesting case of an unlawful suspension of the absolute power of alienation and one recently decided is that of *Benedict v. Salmon*.¹⁸ Testator devised lands to his executors in trust for the use and enjoyment of his eight daughters. Upon the death of his last surviving daughter, he devised same to the children of his daughters who shall be living at that time. The trust was held to be void as there were no persons in being by whom an absolute fee in possession could be conveyed. The absolute power of alienation was suspended for a longer period than during two lives in being. The remaindermen who would take could not be determined until the death of the last surviving daughter. This left the time and the persons who would take the remainder uncertain. Had the remainder vested on the death of the testator, the remaindermen might have taken even though the trust failed. The trust clause being void, the property passed under the residuary clause.

16. 220 N. Y. 437.

* See also *Weed's Practical Real Estate Law*, p. 1054.

Schouler's Law of Wills and Administration, p. 291.

17. *Sanford v. Goodell*, 82 Hun, 369; 31 N. Y. Supp. 490.

18. 177 A. D. 385; 163 N. Y. Supp. 846; *af.* 223 N. Y. 707.

7. *Legacy*.*

(a) Lien of.

In many instances, lands have been devised prior to the date of the appropriation thereof by the State. An examination of the will devising same may disclose a bequest of legacies and it becomes important to determine whether such legacies constituted a lien on the land at the date of appropriation. The principles to be applied in determining whether a legacy is charged by implication upon the real estate of a testator were stated in *Carley v. Harper* (219 N. Y. 295) :

“The intention of the testator is the guide. It is determined from the language of the will read in the light of extrinsic circumstances.” * * * “If the intent is not expressed it must be fairly and satisfactorily inferred.” * * * “The relation of the beneficiaries of the will to the testator is not to be overlooked and the presumption favors children rather than strangers.” * * * “The condition of testator’s estate as he knew or believed it to be at the time he made his will may reveal a deficiency of personal property so great and so obvious as to preclude any possible inference other than that he intended to charge the legacies upon the real estate. * * *, but an intention to charge the land will not be inferred from such disparity, even though serious, if the testator might have been unconscious of its existence, mistaken in judgment as to the value of his personal property, or in reasonable expectation of increasing his personal estate before his death.”

In *Matter of Goetzmann* (96 Misc. 377), it was held under the facts involved, that there was no time limit within which real property of a decedent may be sold for the payment of a legacy charged thereon; that the limitation provided by Section 2702 of the Code did not apply. (§ 233, Surrogate Court Act.)

* See also *Weed’s Practical Real Estate Law*, p. 671.

(b) When Effective.

Where the owner of lands appropriated has died leaving a will in and by which he bequeathed his personal property, an award made for the land appropriated, being personal property, would pass under the will as such.

“The presumption is that in a will of personal property the intention of the testator is that the will shall speak as of the time of his death, but this presumption in the case of specific legacies may be rebutted when the nature of the property or thing bequeathed, or the language used by the testator in making the bequest, indicates that he intended it to speak as of the time of making the will.”¹⁹

(c) Lapsed.

It is a well known rule of law that a legacy (or devise) will lapse when the legatee (or devisee) dies before the testator. The rule also operates where the legatee (or devisee) is dead when the will is made. It is, therefore, necessary in case of a lapsed bequest, under which an award might have passed, to determine who is entitled to same under some other provision of the will, unless testator died intestate as to same.²⁰

E. MORTGAGES.

1. *Generally.*

A very large proportion of the owners of real property have given mortgages to secure bonds, notes or other obligations. These mortgages have generally been recorded and many recorded mortgages given during the past one hundred years may be found unsatisfied of record. The question immediately presents itself as to whether these mortgages, or the debts for the security of which they were given, have in fact been paid. There may be a presumption of payment after twenty years from the time the debt is due, unless it develops that there has been a payment on account of principal

19. *Matter of Thompson*, 217 N. Y. 111.

20. *Matter of Tamargo*, 220 N. Y. 225.

or interest within twenty years or unless there has been an acknowledgment of the debt within the same period of time. Experience shows that mortgages given as long as fifty years ago are still alive, although there are few of such mortgages remaining unpaid. The instances of unpaid mortgages given more than fifty years ago are very rare.

2. *Presumption of Payment.**

Under Section 48 of the Revised Statutes (1829), Vol. 2, page 301, it was provided that —

“After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part or by proof of a written acknowledgment of such right of action within that period.”

This provision remained in effect from 1829 until 1848, when it was repealed by Section 73 of the Code of Procedure. It was further repealed by Chapter 245 of the Laws of 1880.

The limitations provided by Sections 74, 89 and 90 of the Code of Procedure were embraced in Sections 380 and 381 of the Code of Civil Procedure adopted in 1876. It was provided that an action upon a sealed instrument must be commenced within twenty years after the cause of action has accrued. This is a bar to the action rather than a presumption of payment as contained in the Revised Statutes.

Katz v. Kaiser²¹ involved a mortgage, dated and recorded in 1839, as to which there was no proof of subsequent payment or written acknowledgment of the debt. The mortgage was presumed to be paid.²²

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 3, p. 265. Weed's Practical Real Estate Law, p. 777.

21. 10 A. D. 137; 41 N. Y. Snpp. 776; af. 154 N. Y. 294.

22. To the same effect, see Greenfield v. Mills, 123 A. D. 43; 107 N. Y. Supp. 705.

Forsyth v. Leslie, 74 A. D. 517; 77 N. Y. Supp. 826.

CODE references. See Author's Note and Distribution Table — page xxiv.

*Forbes v. Reynard*²³ involved a mortgage given in 1878, which became due in 1883. It was presumed to be paid in 1904 in the absence of proof to the contrary.

As this presumption can be overcome by proof of a partial payment or an acknowledgment of the debt and as the bar to the action can be avoided in the same way, it becomes necessary to inquire whether a payment of principal or interest has in fact been made within the last twenty years or whether there has been an acknowledgment of the debt within the same time. It is a common practice to secure from the mortgagor or his grantee or, in other words, from the person or persons charged with the payment of the debt during the past twenty years, affidavits showing no payment or demand of principal or interest or acknowledgment of the debt so as to keep it alive.

Although the cause of action may have accrued more than twenty years ago as evidenced by a reading of the instrument alone, the life of the debt may have been extended by a payment and the accrual date extended accordingly. This may be done by the payment of interest from year to year extending over a long period of time. As interest or some part of the principal is paid each year, a new agreement might have been made or might result, postponing the date of final payment.

3. *Discharge of Ancient Mortgages.**

As affidavits showing no payment within twenty years simply raise a question of fact which may be rebutted and as the affiant may die and the benefit of his testimony become lost, the better practice is to have the mortgage discharged of record. The proceedings for such a discharge are set forth in Sections 340-4, inclusive, of the Real Property Law.

The first step is to prepare and present to the court a verified petition describing the mortgage. It shall allege that the mortgage has been paid and ask that it may be adjudged to have been paid

²³. 113 A. D. 306; 98 N. Y. Supp. 710.

* See also *Weed's Practical Real Estate Law*, p. 762.

and to be no longer a lien upon the lands described. Section 340 recites the various facts which the petition must allege.

The petition must be presented to the Supreme Court or the County Court of the county where the mortgaged premises are situated. (Section 341.)

Section 342 of the Real Property Law provides for an order to show cause, which shall be published "as the court shall direct." Provision is also made for personal service.

All other proceedings are covered by Section 343, which finally provides that

"upon being satisfied that the matters alleged in the petition are true, the court may make an order that the mortgage be discharged of record."

The order furnishes the authority for the discharge by the county clerk, of the mortgage of record. (Section 344.)

This proceeding, although comparatively simple and a real protection against an unsatisfied mortgage of record, is not taken very frequently, especially in rural communities. Experience shows that it is more generally avoided than taken advantage of as it should be.

4. *Possession of **

A note may be paid and the mortgage given to secure same returned to the mortgagor or the person obligated to pay the debt. Or, a bond may be paid and the bond and mortgage returned. Possession of a mortgage by the one charged with the obligation of paying same raises a presumption of payment and possession of a bond and mortgage may create a conclusive presumption of payment. On the payment of the debt, the one making payment is entitled to a return and the possession of the papers which evidence the debt.²⁴

To the same effect, see *Bacon v. Van Schoonhoven* (87 N. Y. 446, 51) which holds, however, that the delivery of a satisfaction-piece duly executed, to a purchaser of the premises, obviates the necessity of a delivery of the bond and mortgage.²⁵

* See also *Weed's Practical Real Estate Law*, p. 763.

24. *Matter of Coster*, 2 Johns. Chan. 503.

25. See also Chapter 289, Laws of 1907.

The question of the presentation or delivery of a bond and mortgage also arises when the State in paying for lands appropriated, pays the award in whole or in part to the mortgagee. The State acts as agent for the mortgagor, in making the payment. It should demand the mortgage and the instrument which it is given to secure, to guard against the possibility of a previous assignment. The State in effect becomes an assignee; it pays the mortgage and deducts the amount paid from the amount awarded to the owner of the property appropriated.

5. *Merger.**

In practice it is quite common to assume that where a mortgagee of lands acquires title to same, the mortgage merges in the title. There is always the possibility, however, that the mortgagee might have assigned his mortgage before he acquired title; also, that the mortgage did not in fact merge.

A mortgage is not merged in the title to land when the mortgagee obtains the title after he has assigned the mortgage and if one purchases from a mortgagee when the mortgage is on record without requiring the production of the mortgage or the obligation which it was given to secure, he is not a *bona fide* purchaser as against a prior assignee of the mortgage, although the assignment is not recorded.²⁶

To quote from *Curtis v. Moore*:

“There can be no merger, at law, without a union of titles in the same person; nor, in equity, unless, also, there is an intention on the part of those concerned in the transaction that it should operate as a merger. In this case both the union and the intention were wanting.”

A written assignment of a mortgage is not necessary; the mortgage may be assigned by mere delivery. If one takes a written assignment of a recorded mortgage without recording same and without securing the mortgage, the mortgage may be actually delivered and assigned to another.²⁷

* See also *Weed's Practical Real Estate Law*, p. 739.

26. *Curtis v. Moore*, 152 N. Y. 159.

27. *P. T. Co. v. Tonkonogy*, 144 A. D. 333; 128 N. Y. Supp. 1055.

6. *Lost Bond.*

A case of a lost bond arose and was considered in *Peterson v. Meyer*.²⁸ It was held to be "not a negotiable instrument." The production and delivery of the bond was dispensed with.

7. *Satisfaction or Discharge of.*

The instrument by which a mortgage is satisfied or discharged is for the purpose of the record thereof a conveyance. It may be executed by a trustee, executor, administrator or other representative of the mortgagee or the assignee of the mortgagee. When executed by one acting in a representative capacity, it should be for full consideration. One acting in a representative capacity has no power to satisfy a mortgage for a nominal consideration.

Where there is more than one executor, administrator, trustee, partner or tenant in common, any one may satisfy and discharge a mortgage. In case of the death of one or more, the survivor may do the same. The question was considered by the Court of Appeals at length in *People v. Keyser*.²⁹

8. *Release — Part of Premises.**

On the appropriation of lands by the State, if title immediately passes to the State, a claim results in favor of the mortgagee. A release given by a mortgagee of part of the mortgaged premises, *i. e.*, those appropriated, would be ineffectual to satisfy the claim. The State takes the land freed from the lien and nothing is accomplished by a release of the mortgage as to the premises appropriated. The mortgage may be satisfied, however, and thus relieve the State or the mortgagee may release to the State using a form similar to that shown in "Appendix XXII" and "Appendix XXIII."

9. *Release by Trustees.†*

Many mortgages are made to individuals or corporations as trustees for the bondholders. This is especially true with refer-

^{28.} 105 Misc. 719.

^{29.} 28 N. Y. 226.

* See also *Weed's Practical Real Estate Law*, p. 782.

† See also *Weed's Practical Real Estate Law*, p. 782, 4.

ence to mortgages given by railroad, telegraph, telephone and electric companies. In general, the owners of lands or property rights appropriated by the State are not willing to have an award paid to the trustee for the bondholders, *i. e.*, the trustee-mortgagee. The award may be required for the acquisition of other lands or property rights to be used in place of those taken or destroyed by the State. This necessitates a different form of release. "Appendix XXV" may serve as a guide.

A difficulty arises, however, in case the mortgage does not provide for a release. This difficulty is frequently overcome where the mortgage contains an after-acquired property clause, if new property is substituted for that taken. For instance, the State appropriates a bridge and the right to maintain same and provides another bridge. If no damage results other than the cost of constructing a new bridge and if the State pays same, the new bridge may compensate for the loss suffered by reason of the taking of the original bridge.

It sometimes appears that property was covered by a trust mortgage and conveyed without a release; that thereafter the State appropriated from the grantee. The only theory on which a release by a mortgagee for a nominal consideration might be effectual is that the grantee paid full consideration and that the mortgagor used same for the acquisition of other property which passed under the trust mortgage.

As these trust mortgages generally cover personal property, as well as real estate, if the State should pay an award to the owner without a release from the mortgagee, the mortgage would immediately attach to the money so paid. If the money should be expended for other property, the mortgagee would not suffer. But, if the mortgagor should use the money for the payment of wages or salaries, the bondholders might suffer and the trust mortgagee might have a claim against the State on their behalf.

10. *Rights of Mortgagee.*

The danger of taking a release from a trust mortgagee, given for a nominal consideration, is that the bondholders represented by the trustee, *i. e.*, the trust mortgagee, may be primarily injured

and entitled to any award for the land covered by the mortgage to the full amount of the mortgage.³⁰

To the contrary, see *Merriman v. City of N. Y.*,³¹ which is peculiar to the proceedings under the Greater New York Charter.

11. *Tenants by Entirety.**

A mortgage, as well as real property, may be owned by tenants by the entirety. Where owners of lands as tenants by the entirety conveyed same and took back a purchase money mortgage, the mortgage stood in the place of the real property and on the death of either mortgagee passed to the survivor. The same rule was held to apply where a mortgage was taken in the name of a husband and wife. They would hold as tenants by the entirety and on the death of either, the survivor would take.³²

12. *How Affected by Deed.*

Under the common law and prior to the Act of 1830, a mortgagee was treated as the legal owner of the mortgaged premises. Since the Act of 1830, a mortgagee has been regarded as a mere lienor having no legal estate in the land covered by the mortgage. A conveyance would pass no interest in the mortgage.³³

To quote from *Miller v. Lindsey* (19 Hun 207), citing *Purdy v. Huntington* (42 N. Y. 334): "This case * * * holds that the deed cannot operate as a transfer of the mortgage or be construed to be a subsequent assignment of the mortgage under the recording acts."³⁴

Although a deed may not operate as an assignment of a mortgage, a deed from a mortgagee to a mortgagor or to the owner of the equity of redemption has been held to discharge the mortgage and to pass the entire title.³⁵

30. See Chapter XXVI, Third, B., Mortgagees.

31. 227 N. Y. 279.

* *Contra*, see Weed's Practical Real Estate Law, p. 1122.

32. *Matter of Kennedy*, 186 A. D. 188.

33. *Hawley v. Levee*, 66 Misc. 280; 123 N. Y. Supp. 4.

Barson v. Mulligan, 191 N. Y. 306, 15.

34. See also *Curtis v. Moore*, 152 N. Y. 159, 64.

35. *Nickel v. Tracy*, 100 A. D. 80, 6; 91 N. Y. Supp. 287; rev. 184 N. Y. 386.

In *Gottlieb v. New York*,³⁶ Judge Gaynor stated:

“There seems to be an absence of precise authority in this State that a deed of quit claim, or of right, title and interest, by a mortgagee of the land, at least assigns the mortgage.”

He held, however, that where a town conveyed, when it did not own land but only a mortgage thereon, it operated to assign the mortgage.

The foregoing decisions show a conflict in the authorities relative to the effect of a deed given by a mortgagee.

F. LIS PENDENS.*

The right to file a *lis pendens* in any action affecting the title to real property has been held to be an absolute one. When once filed in a proper action, the court cannot order it cancelled so long as the action is pending and undetermined.³⁷ The filing of a *lis pendens* is constructive notice to subsequent purchasers or encumbrancers of the property affected thereby.

The *lis pendens* is notice of an action and unless the action is in fact brought and pending, the *lis pendens* will be ineffectual. A *lis pendens* does not in and of itself constitute an encumbrance upon lands.³⁸

G. HUSBAND AND WIFE.†

It has already been pointed out that a husband and wife *legally married* may hold real property as tenants by the entirety and that, on the death of one, the survivor will take all. Although there is a presumption of a valid marriage, this presumption could be overcome and extreme caution might require proof as to the marriage in the event that property is claimed to be owned solely by a survivor.

36. 128 A. D. 148; 112 N. Y. Supp. 545.

*See also Weed's Practical Real Estate Law, p. 696.

37. *Mills v. Bliss*, 55 N. Y. 139.

38. *Baecht v. Hevesy*, 115 A. D. 509; 101 N. Y. Supp. 413.

†See also Weed's Practical Real Estate Law, p. 574.

Where a wife owns real property, appropriated by the State, for which she files a claim which is personal property and then dies intestate and without descendants, the title to such claim at once passes to and vests in her surviving husband, subject only to the claims of her creditors, but in order to recover the husband should secure letters of administration.³⁹

It is always important to ascertain any rights of dower, in particular where the husband has died and the right of dower has become consummated.

Outstanding rights of dower have been found to exist where the husband died fifty years ago and the wife is still living. In this connection, Section 1596 of the Code of Civil Procedure should be given consideration. It provides that an action for dower must be commenced by a widow within twenty years after the death of her husband, unless she is at the time of his death either:

Within the age of twenty-one years; or

Insane; or

Imprisoned.

The section specifies other conditions on which the twenty year period may be extended.

Experience has disclosed several instances of a death of a husband years ago, leaving a wife still committed to an insane institution and still having a vested right of dower for which an action has not been brought in her behalf.

It thus appears that twenty years is the shortest period of time which will bar a vested right of dower or a remedy to secure same.

It is very frequently found that deeds have been executed by men in years past without reciting whether or not they were married and without any wife joining in the deed. In such cases it becomes necessary to obtain proof as to whether or not the grantor was married, for if he was married, and his wife did not join in the deed and is still living, she may still have a dower right.

39. See *Gerber v. State Bank*, 167 A. D. 263; 152 N. Y. Supp. 698.

Conlon v. Union Dime Savings Bank, 195 A. D. 509.

CODE references. See Author's Note and Distribution Table — page xxiv.

There is also the possibility that a wife might have secured a divorce from her husband, retaining her inchoate right of dower; that the husband might later have conveyed real property without the wife joining in the deed; also, the possibility that the husband might have married again and that the second wife might have joined in the deed. The dower interest of the first wife might be outstanding.

1. *Conveyances Between Husband and Wife.*

Under the common law a husband could not convey lands to his wife; neither could the wife convey to her husband.⁴⁰

These common law disabilities have been changed by statute.

Chapter 200 of the Laws of 1848 enabled a married woman to acquire real property "from any person other than her husband" and to hold same to her sole and separate use as if she were unmarried. This act was amended by Chapter 375 of the Laws of 1849, which enabled a married woman to convey and devise real property. The power to take was still limited "from any person other than her husband."

Chapter 472 of the Laws of 1880 enabled a husband and wife to *partition* lands held by both but did not enable one to convey all to the other.

The disability of a husband and wife to convey lands to each other was wholly removed by the passage of Chapter 530 of the Laws of 1887. The condition of the law upon this subject, as it existed prior to the passage of that statute, was reviewed in *Dean v. M. E. R. Co.*⁴¹ It was held that conveyances of real property "between husband and wife, though void at law, are sustained in equity when founded upon a valuable or meritorious consideration." Such a conveyance will not be sustained, however, unless the party claiming under the deed shows facts establishing a consideration which a court of equity will sustain. An equitable consideration may be shown by extraneous proof or it may appear upon the face of the conveyance.

40. *Dean v. M. E. R. Co.*, 119 N. Y. 540.

41. 119 N. Y. 540.

H. CORPORATIONS.*

1. *Mergers and Consolidations.* †

Much of the land which has been appropriated by the State was owned by corporations. Many of these corporations existed as a result of the merger or consolidation of other corporations. This applies, in particular, to railroad and other transportation corporations such as electric light and power companies.

Although there is a distinction between a merger and a consolidation, the two words are frequently confused and are often used interchangeably.

A "merger" is provided for by Section 15 of the Stock Corporation Law which reads as follows:

"Any domestic stock corporation and any foreign stock corporation authorized to do business in this state lawfully owning all the stock of any other stock corporation organized for, or engaged in business similar or incidental to that of the possessor corporation may file in the office of the secretary of state, under its common seal, a certificate of such ownership, and of the resolution of its board of directors to merge such other corporation, and thereupon it shall acquire and become, and be possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by the board of directors of such possessor corporation, and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof. Any bridge corporation may be merged under this section with any railroad corporation which shall have acquired the right by contract to run its cars over the bridge of such bridge corporation."

It thus appears that one *stock* corporation may become extinct

* See also Weed's Practical Real Estate Law, p. 250.

† See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 26, p. 955. Weed's Practical Real Estate Law, p. 737.

or merged into another, subject only to the rights of the creditors of the corporation so merged.⁴²

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Section 7 of the Business Corporations Law provides generally for the consolidation of corporations. Two or more corporations carrying on any kind of business of the same or similar nature may consolidate into a single corporation. Such consolidation is brought about by an agreement made on behalf of the respective consolidating corporations, which among other things may prescribe the name of the new corporation.

The name of the new corporation may be the same as that of one of the consolidating companies, or a different name may be selected.⁴³

The effect of a consolidation is a dissolution of the constituent companies.⁴⁴

The distinction between a merger and consolidation, therefore, is that in case of a merger the company into which the other company or companies is or are merged does not lose its identity, is not dissolved and does not become a new corporation, while in case of a consolidation, all of the consolidated companies are dissolved and a new corporation is created.

The powers of consolidated corporations are set forth in Section 9 of the Business Corporations Law which provides that the new corporation shall enjoy all the rights possessed by each of the corporations so consolidated.

Upon the consummation of the consolidation, the rights and interests of each of the corporations so consolidated, and all property of every nature belonging to either of them "shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed;" the title to all real estate

42. *Irvine v. N. Y. E. Co.*, 207 N. Y. 425, 32.

43. See *Drake v. N. Y. S. W. Co.*, 36 A. D. 275; 55 N. Y. Supp. 225.

44. *People v. N. Y. C. R. R. Co.*, 129 N. Y. 474.

vested in either of such corporations shall be vested in the new corporation by virtue of the act of consolidation.⁴⁵

The rights of the creditors of any corporation so consolidated shall not in any manner be affected by such consolidation. But, the new corporation shall be held liable to pay and discharge all debts and liabilities of each of the corporations so consolidated, in the same manner as if the new corporation had itself incurred the indebtedness.⁴⁶

The General Corporation Law (§ 9) contains general provisions for the filing of certificates of incorporation in the office of the Secretary of State, where the evidence of the merger or consolidation may be found. Paragraph 3 of Section 9 although apparently dealing with a corporation resulting from a consolidation agreement also refers to two or more corporations "merged into a new corporation." The distinction above pointed out between a merger and a consolidation does not appear to be recognized.

In a further consideration of the subject, it is necessary to refer to the respective laws, to illustrate: Article IV of the Railroad Law makes provision for the consolidation and reorganization of any railroad or other corporation owning or operating a railroad, bridge or tunnel. Such corporation "may merge and consolidate" with another as provided by Section 140 of the Railroad Law on certain specified conditions. The rights of the new or consolidated company are set forth in Section 142.

The rights of all creditors and the liens upon the property of either of such corporations so consolidated are preserved and all debts and liabilities incurred by either of such corporations attach to the new corporation and may be enforced against it and its property as if incurred by the new corporation.⁴⁷

Electric light corporations may consolidate into a single corporation or one corporation may be merged with another cor-

45. Section 10, Business Corporations Law.

46. Section 11, Business Corporations Law.
Matter of Utica Nat. B. Co., 154 N. Y. 268.

47. Section 143, Railroad Law.

poration as provided by Section 61 (Par. 3) of the Transportation Corporations Law.

2. *Mortgages by — After Acquired Property.*

Where a corporation from which the State appropriates lands exists as the result of the merger or consolidation of other corporations which have given mortgages affecting the lands so appropriated, the rights of such mortgagees must be considered and satisfied. It is commonly found that such mortgages contain after-acquired property clauses, *i. e.*, the mortgages contain provisions that they shall attach to and become a lien upon any real property thereafter acquired by the mortgagor corporation. Assume that the mortgagor corporation thereafter becomes merged into another corporation or consolidates with another corporation, thus forming a new corporation. Assume further that the corporation into which the mortgagor corporation becomes merged or the new corporation resulting from a consolidation acquires additional real property. The question arises as to whether such mortgages containing after-acquired property clauses, become a lien upon such after-acquired real property.

There is involved the question as to whether a corporation into which other corporations are merged or a corporation resulting from a consolidation may be liable for the debts of the original corporations by reason of statutory provisions or specific agreement, including debts secured by mortgages.⁴⁸

In *Compton v. Jesup*,⁴⁹ it was held that the extent of the property included in the grant of the mortgage by a railroad company depended on two things:

First. What property had the railroad company power to mortgage?

Second. What property did it intend to mortgage?

Answering the first question, the court stated that:

“A railroad company authorized by its charter to build and operate a railroad between two named points would

48. See *Prouty v. L. S. & M. S. R. R. Co.*, 52 N. Y. 363.

49. 68 Fed. Rep. 263, 86.

have the power to mortgage its road then built, or to be built by itself or by any successor in title to the same railroad, whether exercising the mortgagor's franchises, or similar franchises granted by the same sovereign. What is mortgaged is the property, and all accretions to the property possible within the limitations of the then charter; and it does not seem to us material whether the successor in title to the railroad acquired such accretions under the same franchises as those under which the road was first projected and constructed, or under new franchises of the same effect and character. * * * the acquisition of terminal property at Toledo was as much permitted under the franchises enjoyed by the divisional mortgagors as under those under which it was actually acquired, and such terminal property would have been as properly appurtenant to the Ohio Division as to the consolidated line. * * * We are of opinion, therefore, that an Ohio railway corporation has the power to mortgage its railroad, and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or any successor in title, whether the road be then maintained by virtue of the original franchises, or of franchises newly acquired from the State."

Answering the second question, the court held that it was the intention to mortgage the road of the mortgagor company made and to be made, with the necessary buildings erected and to be erected. Every company acquiring the railroad thus described, from the mortgagor company, took title subject to the mortgages thus construed, and in making additions or accessions within the terms of the mortgage, was estopped from denying that such accretions were subject to the mortgage lien.

From the foregoing, it would appear that if the new company is simply carrying out the plan of one or more of the old companies, and in so doing acquires property, the after-acquired property clause contained in the mortgage of the old company would cover property acquired by the new company.

A distinction would result if the new company should acquire property in pursuance of a plan to extend or build a different road than that contemplated by the original company. In such a case there would be nothing to show an intention to mortgage the property necessary for a railroad not contemplated by the mortgagor.

Chapter 917 of the Laws of 1869, being an act in relation to the consolidation of railroads, provided that all liens upon the property of corporations consolidated "shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations except mortgages shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it."

Particular attention is called to the words "except mortgages."

These words were under consideration by the Court of Appeals in *Polhemus v. F. R. R. Co.*⁵⁰ The word "mortgage" was held to mean "the liability impressed by the company upon the property then owned, or thereafter to be acquired, and to except mortgages means to confine the property lien created by a mortgage to the property theretofore held by the consolidating company. Railroad mortgages are known to contain clauses for extending their lien to future acquisitions of property, or extensions of road, and by their exception, in the clause under consideration, such a consequence would be prevented."

The court further held:

"The true theory of this act is that each consolidating company survives in the consolidated company, and that it represents each company in its claims and its obligations, but as to the mortgage liabilities the properties acquired remain affected only as they were affected before the consolidation. Whatever the liability created by the mortgage instrument, it shall not be deemed to be extended, or to affect

50. 123 N. Y. 502.

the new company, otherwise than might result from a foreclosure."

The statutory provision relative to the rights of creditors of consolidated railroad corporations is now found in Section 143 of the Railroad Law. It is to be noted that the words "except mortgages" have been eliminated.

Judge Hatch, writing the opinion in *Drake v. N. Y. S. Water Co.*,⁵¹ stated that a strong ground exists for saying that a mortgage given by a corporation which afterwards becomes part of a consolidated corporation, became a lien upon all of the property held by the consolidated company but that he did not find it necessary to determine or discuss the question in that action.

On a subsequent appeal to the Appellate Division,⁵² Judge Cullen quoted the remarks of Judge Hatch and stated:

"There is still some difference of opinion among the members of this court on the question, and we do not find it necessary even yet to decide it."

These two decisions were referred to in *A. T. Co. v. N. Y. C. S. W. Co.*⁵³ The court stated:

"A judgment in the plaintiff's favor was reversed on each appeal, but without determining the question whether either the provision in the mortgage in terms subjecting any after-acquired property of the corporation to the lien of such mortgage or a similar provision in the consolidation agreement was sufficient to accomplish the purpose. In each opinion delivered, however, a strong intimation was given by the respective writers that the lien did exist, although after the argument of the second appeal there was still some difference of opinion among the members of the court. It is unnecessary to determine the question in disposing of the present appeal."

51. 26 A. D. 499; 50 N. Y. Supp. 826.

52. 36 A. D. 275; 55 N. Y. Supp. 225.

53. 75 A. D. 354; 78 N. Y. Supp. 120.

All three decisions are cited in *Inman v. N. Y. I. W. Co.*, 131 Fed. Rep. 997.

The effect of an after-acquired property clause in a railroad mortgage as applied to equipment purchased by a consolidated company was considered in *N. Y. S. & T. Co. v. L. E. & St. L. C. R. Co.* (102 Fed. Rep. 382), and at page 398, the court stated:

“The after acquired property clause in each of the mortgages can rightly be construed, I think, to extend only to property subsequently acquired by the mortgagor. The consolidated company is a new and different organization. The case of *Hinchman v. Railway Co.* (Wash.) (44 Pac. 867), is quite in point, and in principle the question seems to be covered by the decision in *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.* (115 U. S. 587).”

The case cited of *Hinchman v. Railway Co.*,⁵⁴ also involved a mortgage containing an after-acquired property clause but it was a chattel mortgage covering equipment. The point was made that the equipment purchased by the consolidated company was not in existence nor “contemplated” at the time the mortgage was given; that no part of the money secured by the mortgage was loaned upon the faith or credit of the property afterwards acquired; that it was not an accession to the property mortgaged by the old railway company.

It thus appears that the effect of an after-acquired property clause is not clearly settled in this State. The reasoning adopted in *Compton v. Jesup*,⁵⁵ already quoted from, presents a logical solution and should be controlling.

There remains, however, another question, viz.: Whether a mortgage given by a company before a merger or consolidation, even though a lien on the property acquired by a merged or consolidated corporation, would be a superior lien to a mortgage

54. 44 Pac. Rep. 867.

55. 68 Fed. Rep. 263.

given by a merged or consolidated corporation on such after-acquired property.

If the lien of the original mortgage attached at all, it would attach the moment the property was acquired and be superior to any subsequent mortgage given by a merged or consolidated corporation.

If the property should be acquired after the merged or consolidated corporation had given a mortgage which also contained an after-acquired property clause, a more serious question as to priority might arise. As the mortgagee of the merged or consolidated corporation would be charged with notice of the mortgages given by the original companies, the equities would be in favor of the original mortgagees and the lien of the original mortgages should be superior.

3. *Dissolved Corporations.**

In some instances, lands have been owned by a stock corporation which has been dissolved previous to the time when the State appropriated such lands, the title still being in such corporation or its directors.

Upon the dissolution of a stock corporation, the directors of such corporation take and hold the assets of the corporation as trustees for the creditors of the corporation on the one hand and for the stockholders of the corporation on the other. It is the duty of the trustees to first satisfy the claims of the creditors and then distribute the balance of the assets of the corporation among the stockholders. The directors as such trustees become vested with the title to the lands of the corporation.⁵⁶

Section 221, General Corporation Law, paragraph 2, provides that upon the dissolution of a corporation, its board of directors shall proceed to wind up its affairs and "to sell its assets at public or private sale."

Paragraph 3 of Section 221 of the General Corporation Law provides, however, that said corporation shall nevertheless continue

* See also Weed's Practical Real Estate Law, p. 263.

56. See *Tapley Co. v. Keller*, 133 A. D. 54; 117 N. Y. Supp. 817. *City of N. Y. v. N. Y. & S. B. F. & S. T. Co.*, 231 N. Y. 18.

in existence for the purpose of doing all acts required in order to wind up its affairs.

Under the provisions of the last paragraph, the officers of a corporation when ordered so to do by the board of directors, may sell and convey lands of the corporation.⁵⁷

The corporation is continued by paragraph 3 referred to and may prosecute a claim against the State for the appropriation of its lands and may recover judgment therefor.

If after a corporation is dissolved, the officers thereof by order of the board of directors, sell and convey lands before the appropriation thereof by the State, a good title passes to the grantee from whom the State might appropriate.

Eighth. Judgments.

The determination of the Court of Claims upon a claim shall be by a judgment to be entered in a book to be kept by the clerk of the court for that purpose.⁵⁸

For form of judgment, see "Appendix XIX."

As judgment should be entered only in favor of the person or persons entitled to payment for lands appropriated as disclosed by the search and examination of title by the Attorney General, it becomes necessary before the entry of judgment, for the Attorney General to advise the clerk of the Court of Claims, the names of the proper parties in whose favor judgment should be entered.

On the entry of judgment, a certified copy thereof shall be filed with the Comptroller. This is required before the judgment can be paid.⁵⁹

A. AMENDMENT OF JUDGMENTS.

The same rules apply to the amendment of the judgment, as in the Supreme Court. These rules were well defined in *Herpe v. Herpe* (225 N. Y. 323), as follows:

57. See *A. P. & C. Co. v. City of New York*, 149 A. D. 622, 30; 134 N. Y. Supp. 433.

58. Section 269, Code of Civil Procedure; Section 25, Court of Claims Act.

59. Section 269, Code of Civil Procedure; Section 25, Court of Claims Act.

1. The rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal.

2. Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment.

B. INTEREST ON JUDGMENTS.

"Interest shall be allowed on each judgment of the Court of Claims from the date thereof until the twentieth day after the Comptroller is authorized to issue his warrant for the payment thereof or until payment, if payment be made sooner. But no such judgment shall be paid until there shall be filed with the Comptroller a copy thereof duly certified by the clerk of the Court of Claims together with a certificate of the Attorney General that no appeal from such judgment has been or will be taken by the State, and a release and waiver by the attorney for the claimant of any lien for services upon said claimant's cause of action," etc.⁶⁰

The requirements of the claimant under Section 269 of the Code are fully set forth in *People v. Glynn*.⁶¹ It was held that if the claimant did not present the proper vouchers and papers to the Comptroller but instead appealed from the judgment, interest could be allowed for only twenty days.

If a delay results through no fault of the claimant and if claimant is delayed in receiving payment of his judgment, a situation may be presented where the claimant would be entitled to

60. Code, Section 269; Court of Claims Act, Section 25.

61. 126 A. D. 519; 110 N. Y. Supp. 405.

interest for more than twenty days and until the judgment is paid.⁶²

C. PAYMENT OF JUDGMENTS.

After the entry of a judgment, the following should be filed in the office of the Comptroller pursuant to Section 269 of the Code:

1. Certified copy of judgment.
2. Certificate of Attorney General that no appeal will be taken.
3. Release and waiver by attorney of record for claimant, of any lien.
(The foregoing should be filed by claimant's attorney.)
4. Abstract of title and certificate of search as to incumbrances.
(The Attorney General files same in connection with his report and approval of title.)

The Comptroller furnishes form of attorney's release and form of satisfaction of judgment which must be executed by claimant.

D. DEPOSIT.

In the event that the Attorney General does not approve the title of claimant and certifies that there may be other parties in interest, or if other parties are brought in and made parties to the claim under Sections 281 or 281-a of the Code, a release or satisfaction executed by such other parties must be filed. If such release or satisfaction is not filed or if the Court of Claims directs a deposit under Section 268-a of the Code, the Comptroller must deposit the amount awarded in any bank in which moneys belonging to the fund from which such compensation is payable, may be deposited, to the account of such award. The deposit should be made to the credit of claimant and such other parties.

E. DISTRIBUTION OF AMOUNT OF JUDGMENT.

Section 268-b, added to the Code of Civil Procedure in 1920, for the first time created a uniform method for the disposition

⁶². See *People v. Sohmer*, 153 A. D. 642; 143 N. Y. Supp. 1086.
CODE references. See Author's Note and Distribution Table — page xxiv.

and distribution of the amount of awards deposited by the Comptroller. A petition to the Supreme Court and an order thereon is provided for. The order is to be served in the same manner as an order bringing in parties under Section 281-a of the Code and what has been stated in reference thereto may be helpful to one seeking distribution.⁶³

Conflicting claims may be finally disposed of under this section of the Code, unless one of the parties should desire a trial of the issues and should bring an action in the Supreme Court for the determination of such issues.

Without the statutory provisions of Section 268-b of the Code, it might be urged that the Supreme Court had no power to order a distribution on a petition and that questions of title could not be disposed of in such a summary way. Even with Section 268-b, anyone claiming to own the whole or part of the property appropriated and the amount of the award deposited in lieu thereof or part of same, might be entitled to a trial by jury should he elect to bring an action.⁶⁴

63. See Chapter XXVI, Fourth, E., hereof.

64. See *Matter of Bronx Parkway Com.*, 99 Misc. 397, 403; 164 N. Y. Supp. 9; dis. 180 A. D. 909; 167 N. Y. Supp. 1039; af. 191 A. D. 922; 181 N. Y. Supp. 928.

CODE references. See Author's Note and Distribution Table—page xxiv.

CHAPTER XXVII.

Agreements With Special Examiner and Appraiser.

When Chapter 147 of the Laws of 1903 was enacted, providing for the appropriation of lands for the use of the improved canals, the Court of Claims was given jurisdiction to determine the amount of compensation for lands, structures and waters appropriated. Due to the large number of appropriations and the number of claims to be filed on account thereof, the work of the court was very likely to become congested. To relieve the Court of Claims of the extreme burdens which would be cast upon it, three Special Examiners and Appraisers were provided for by Chapter 335 of the Laws of 1904. They were given the right to fix and determine with the respective owners of property appropriated, upon a fair valuation therefor. Under the act the agreements were to be submitted to the Canal Board for approval.

By Chapter 195 of the Laws of 1908, the number of Examiners and Appraisers was reduced and it was provided that the Governor should appoint one Special Examiner and Appraiser. Agreements fixing and determining the amount to be paid by the State for property appropriated were to be submitted to the Superintendent of Public Works, who, if he should approve same, was required to submit the agreements to the Canal Board.

In all cases of approval by the Canal Board, payment could not be made to the persons making agreements with the Special Examiner and Appraiser without the approval of title by the Attorney General, and without the certificate of the Attorney General that the persons making the agreements were the only ones entitled to compensation.

As in many cases, lands at the time of the appropriation were owned by infants or by persons incompetent to manage their affairs, or the right to payment was vested in one or more persons

for life with contingent remainders in persons the identity of whom could not be ascertained until the death of the life tenant, the Special Examiner and Appraiser could not make an agreement as there was no one competent to enter into an agreement, or who could represent the owners of the contingent interests. Chapter 286 of the Laws of 1910 was enacted and the Supreme Court given jurisdiction to appoint a special guardian of an infant or incompetent person who might enter into an agreement with the Special Examiner and Appraiser. In case of a contingent remainder the Supreme Court was authorized to appoint a trustee to enter into an agreement with the Special Examiner and Appraiser and to receive payment from the State of the amount agreed upon. Provision was made for the investment by the trustee for the benefit of the parties in interest.

Further provision was made to cover a case where the right of compensation was vested in a trustee at the time of the appropriation.

Sections 2-A, 2-B and 2-C of Chapter 286 of the Laws of 1910 set forth in detail the steps to be taken, all of which must be strictly followed according to the section applicable.

Agreements made by a Special Examiner and Appraiser are in the nature of a settlement or adjustment as to the amount which the State should pay in satisfaction of the claim which is made. Claims are generally regarded as being personal property but an exception has been made in case the land appropriated was owned by an infant or incompetent. The claim then retains its original character of realty.¹

Chapter 448 of the Laws of 1915 abolished the office of Special Examiner and Appraiser as theretofore existing and created a bureau of appraisal in the office of the Superintendent of Public Works. The power of appointment was transferred to the Superintendent of Public Works. Agreements to be made by the Special Examiner and Appraiser were subject to approval by the Superintendent of Public Works and the Canal Board.

1. *Ametrano v. Downs*, 170 N. Y. 388, 92.

The powers of the Special Examiner and Appraiser and the effect of an agreement entered into by him were under consideration in *People v. N. Y. O. & W. R. Co.*² It was held that the State officers had ample power to make a settlement or adjustment, and in the absence of mistake or fraud, the State was not at liberty to disavow the settlement; that when the State authorizes certain officers to settle for lands and properties which it has appropriated or damaged, the effect of such a settlement is the same as between private persons.

The effect of an agreement with the Special Examiner and Appraiser was again considered by the courts and held to be conclusive in *People ex rel. N. Y. C. R. R. Co. v. Walsh*.³

For form of agreement with Special Examiner and Appraiser, see "Appendix XXVI."

2. 133 A. D. 476; 117 N. Y. Supp. 1048.

3. 211 N. Y. 90.

CHAPTER XXVIII.

Agreements With Superintendent of Public Works.

Section 80 of the Canal Law authorizes the Superintendent of Public Works to appropriate lands, structures and waters for the use of the canals. On such appropriation, the owner may file a claim with the Court of Claims but the Superintendent of Public Works is not authorized to make any agreement with the owner as to the compensation which he should receive. Neither is the Special Examiner and Appraiser authorized to make an agreement for lands appropriated by the Superintendent of Public Works.

Lands may be appropriated by the Superintendent of Public Works for the purpose of providing earth and gravel necessary to raise, widen, strengthen or otherwise improve the earth structures of the canals. It is to be noted that the purposes of the appropriation are limited to cases where the lands are necessary to provide earth and gravel and not for general purposes as under Section 80 of the Canal Law. The Superintendent of Public Works is authorized to adjust a claim for damages by reason of an appropriation under Section 81 of the Canal Law, subject to the approval of the Canal Board.

Navigation is frequently interrupted or endangered by reason of a break in the canals or a weakening of embankments and it becomes necessary for the Superintendent of Public Works to enter upon and use contiguous lands and to procure materials therefrom necessary to make repairs. Such entry is characterized as a temporary appropriation under Section 82 of the Canal Law. The Superintendent of Public Works is authorized to agree upon the amount of damage to be paid subject to the approval of the Canal Board.

The Superintendent of Public Works may also, subject to the approval of the Canal Board, agree with the owner of lands over-

flowed by the erection of a dam by the Superintendent of Public Works, on the amount of damages resulting from the overflow.¹

The Superintendent of Public Works may also agree with the owner of any hydraulic privilege affected by the taking of an additional supply of water for the canals.²

Temporary supplies of water for the use of the canal may be secured by the Superintendent of Public Works and he may agree with the owner of any property used for temporary purposes on the amount of damages sustained by him, subject to the approval of the Canal Board.³

Whenever a claim brought against the State on account of the canal shall be settled or compromised, the written consent and agreement thereto by the Superintendent of Public Works is required under Section 270 of the Code of Civil Procedure.

1. Section 84, Canal Law.

2. Section 86, Canal Law.

3. Section 87, Canal Law.

CODE references. See Author's Note and Distribution Table—page xxiv.

CHAPTER XXIX.

Agreements With Conservation Commission.

- First. In Case of Appropriation.
- Second. In Case of Purchase.
- Third. Forms.

First. In Case of Appropriation.

Paragraph 6 of Section 59 of the Conservation Law provides for an agreement between the Conservation Commission and the owner of lands appropriated. "Claims for the value of the property appropriated and for legal damages caused by any such appropriation, may be adjusted by the Commission, if the amount thereof can be agreed upon with the owner or owners thereof."

Section 59 of the Conservation Law is a part of Chapter 451 of the Laws of 1916. In the same year, Chapter 569 of the Laws of 1916 became a law, outlining a particular procedure for the acquisition of lands for State park purposes.

On June 9, 1919, Attorney General Charles D. Newton rendered an opinion to the effect that, when lands were appropriated under Chapter 569 of the Laws of 1916, no agreement could be made by the Conservation Commission without the consent and approval of the Commissioners of the Land Office. The effect of this opinion makes necessary the approval of the Commissioners of the Land Office as to the amount to be paid as well as any special provisions authorized by law.

By the enactment of Chapter 206 of the Laws of 1921, all doubt was removed. Subdivision 6 of Section 59 of the Conservation Law was amended by adding the following:

"If the property was appropriated pursuant to the provisions of chapter five hundred and sixty-nine of the laws of nineteen hundred and sixteen and acts supplemental thereto

or amendatory thereof, such adjustment shall be subject to the approval of the commissioners of the land office."

Section 59 of the Conservation Law specifies certain reservations which the owner of lands appropriated may make:

Paragraph 9 provides that the owner may reserve trees not less than eight inches in diameter, breast high;

Paragraph 11 restricts the manner of exercising the right to remove timber;

Paragraph 12 fixes the time of making compensation for lands appropriated.

Other provisions of Section 59 of the Conservation Law refer to the adjustment by the Commission of claims for trespass or other injuries, the payment of amounts agreed upon and interest.

Second. In Case of Purchase.

Although Section 59 of the Conservation Law is entitled: "Appropriation of Real Property," the provisions thereof cover purchases as well as appropriations, and some of the provisions apply exclusively to purchases.

Paragraph 10 applies to a purchase only.

Paragraphs 11, 12, 14, 17 and 19 apply to both a purchase and an appropriation.

Third. Forms.

In case of an appropriation and agreement, an appropriation is first made by service of notice thereof and the agreement follows.

The first step is a consent by the owner to an adjustment by the Conservation Commission. The Commission by resolution may thereupon determine the amount to be paid in accordance with the consent and authority of the owner.

The Conservation Commission may thereupon report to the Commissioners of the Land Office with a request that the Commissioners of the Land Office approve the adjustment. If the Commissioners of the Land Office approve, a resolution to that effect should be adopted and a certificate executed by the Secretary

of the Commissioners of the Land Office, showing the adoption of such a resolution. The Conservation Commission should then certify to the Comptroller, so that payment may be made.

For forms, see "Appendix XXVII."

In case of a purchase, the agreement is the first step in the proceedings. For form of agreement, see "Appendix XXVIII."

CHAPTER XXX.

Miscellaneous Agreements.

Special acts covering the appropriation of lands for various State purposes contain provisions for the making of agreements with the owners of appropriated property. As an illustration, Chapter 178 of the Laws of 1919 provided for the acquisition of lands and the construction of a tunnel under the Hudson River between the States of New York and New Jersey. Previous thereto, the Legislature had created The New York State Bridge and Tunnel Commission. By the Act of 1919, the Commission was authorized to acquire title to lands for the construction of the tunnel and to cause an appraisal of such lands to be made. The Commission was authorized to enter into an agreement with the owners of property appropriated as to the compensation to be paid therefor.

Special acts of the Legislature have authorized the Superintendent of State Prisons and other State officials to acquire lands and to enter into agreements with the owners thereof as to the compensation to be made by the State.

In some cases, lands are appropriated and titles acquired by the State by virtue of the act of appropriation. An agreement fixing the compensation is all that is required.

In other instances, title is acquired by purchase and conveyance. The agreement preceding same should not only provide for the conveyance but should fix the compensation to be made.

PART FIVE.

Tax Titles.*

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|-------|----------|-----------------------------------|
| Chap. | XXXI. | Possession Under Tax Deeds. |
| | XXXII. | Tax Law — Procedure Under. |
| | XXXIII. | Irregularities. |
| | XXXIV. | Jurisdictional and Other Defects. |
| | XXXV. | Statutes of Limitations. |
| | XXXVI. | Statutes of Repose. |
| | XXXVII. | Laches. |
| | XXXVIII. | Defective Deeds. |
| | XXXIX. | Ineffectual Deeds. |
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Generally.

The subject of tax sales and tax titles has been elaborately treated by text book writers. The purpose of this work is to set forth how the State is concerned when it secures a tax deed running directly to the State or how it and an individual are concerned when the individual offers to sell and convey lands to the State, the title of the individual resting on a tax deed.

Tax deeds are generally issued by the State Comptroller or by a county treasurer or county judge.

If a tax be not paid, "the State, by virtue of its taxing power, and through the medium provided by statute, either acquires the land or grants it to a citizen." The purchaser obtains title from a source other than the former owner and is not affected by any infirmities in the title of the former owner.¹

* See also Weed's Practical Real Estate Law, p. 1098.

1. O'Donnell v. McIntyre, 118 N. Y. 156.

The purchaser at a tax sale may be given "an absolute title."²

A particular tax sale may be good and the tax deed issued pursuant thereto may convey a valid title,³ or the sale may be bad and the deed issued pursuant thereto may be void or voidable and convey no title—it is generally a matter of legal opinion by no means conclusive until passed upon by the courts. In order to arrive at an opinion as to the validity of a tax deed, requires an extensive examination of records, statutes and authorities which are by no means harmonious. The Court of Appeals in 1911 stated:

"The repeated changes in the Tax Laws of the State and the apparent inconsistency between some of the provisions, render it at times difficult to determine how those laws operate in a particular case."⁴

In given cases there have been such elements of possession by the holder of a tax deed as to lessen the uncertainty, but in general there has not been sufficient possession to be of assistance. This is especially true with respect to forest lands.

The holder of a tax deed, whether valid or void, cannot take possession of the lands described in the deed, by force, if the lands sold are occupied when he attempts to take possession. At the most, he can bring an action against the owner and possessor for possession, in which action, the validity of his tax deed may be determined.⁵

The owner is entitled to a trial by jury as of right.⁶

When the same lands have been repeatedly sold for taxes to the same or different persons, the burden and difficulty of deter-

2. *Terrel v. Wheeler*, 123 N. Y. 76, 84.

3. *Becker v. Howard*, 66 N. Y. 5.

4. *Bryan v. McGurk*, 200 N. Y. 332.

5. See *Becker v. Howard*, 66 N. Y. 5.

O'Donnell v. McIntyre, 118 N. Y. 156, 62.

6. *Bryan v. McGurk*, 200 N. Y. 332, 7, 8.

mining the validity of the sales involved and the title secured thereby increases with the number of sales.

In case of an offer to sell forest lands where it is proposed to convey title to the State by deed, if the person offering has only a tax deed, it is frequently not possible to determine with a reasonable degree of certainty, whether the State will be protected in paying the person so offering the lands for sale and whether the State will secure a valid title from such person. The State should secure a title which it can defend if attacked. In case of trespass, the State's title should be such that it can succeed in an action for trespass or in ejectment brought by the State.

The same rule applies to any individual buying from one who has only a tax title.

CHAPTER XXXI.

Possession Under Tax Deeds.

First. Actual Possession.

Second. Constructive Possession.

Third. Possession by the State.

In the main, there are two kinds of possession to be considered, actual and constructive. Likewise, two parties are to be considered — the former owner and the holder of the tax deed.

If a tax sale and tax deed are valid, the holder thereof may be the true owner and in constructive possession. It is only in a case where the tax deed is not valid that the question of right to possession as between the former owner and the holder of the tax deed becomes material.

First. Actual Possession.

If the true owner is in actual possession, he may retain same as against the holder of a void tax deed.⁷

If the holder of a void tax deed is in actual possession following a peaceable entry, he may retain same as against the true owner provided he is protected by a statute of limitations and provided the full period stated therein has expired.

Although a tax deed may be void, if the holder thereof obtains actual possession of the lands described therein peaceably, he may be able to retain such possession as against one who was the true owner at the time the tax deed was issued.⁸

7. *Joslyn v. Rockwell*, 128 N. Y. 334.

People v. Faxon et al., 111 Misc. 699; 182 N. Y. Supp. 242, no appeal.

8. *Halsted v. Silberstein*, 196 N. Y. 1, 7.

Peterson v. Martino, 210 N. Y. 412, 20.

Doud v. H. H. Congregation, 178 A. D. 748; 165 N. Y. Supp. 908.

The possession referred to is not such as to amount to adverse possession for a period of twenty years, although adverse possession may be involved in some of the cases cited.

A holder of a void deed must have adverse possession for twenty years in order to secure the equivalent of title.

Under the authority of the Doud case⁹ the holder of a void *tax* deed need have actual possession for only five years in order to secure the equivalent of title.

The statute operates as a "statute of repose" which will be referred to later.

If the lands described in a tax deed are occupied and if the tax purchaser cannot secure possession peaceably, he can only secure such possession by action in ejectment. In such action, the validity of the tax deed could be questioned and determined.¹⁰

An actual or constructive possession may give way to an actual or constructive eviction. A constructive eviction exists only in case of an *abandonment* of possession.¹¹

Second. Constructive Possession.

The true owner is in the constructive possession of lands and has the right to possess same unless the lands are in the actual hostile occupancy of another under a claim of title such as a tax deed. Constructive possession follows the legal title; it cannot be based on a void tax deed.

The true owner is in constructive possession as against the holder of a void tax deed who has not made an entry.¹²

9. 178 A. D. 748; 165 N. Y. Supp. 908.

10. O'Donnell v. McIntyre, 118 N. Y. 156.

11. Mead v. Stackpole, 40 Hun, 473.

Archibald v. N. Y. C. R. R. Co., 157 N. Y. 574, 83.

See also Nicholas v. Kellas, 90 Misc. 432; 154 N. Y. Supp. 22; af. 173 A. D. 923.

12. Johnson v. Elwood, 53 N. Y. 431.

Bliss v. Johnson, 94 N. Y. 235, 42.

Wiechers v. McCormick, 122 A. D. 860; 107 N. Y. Supp. 835.

Clark v. Kirkland, 133 A. D. 826, 35; 118 N. Y. Supp. 315; af. 202 N. Y. 573, no opinion.

A person in actual possession of part under a defective tax deed is in constructive possession of the balance of the lands described in the conveyance. But, the area of the balance of the land must not be too large in proportion to that occupied and must be used in connection with that occupied.¹³

If the true owner is in constructive possession only, *i. e.*, if the land is vacant, the reasoning adopted in *People v. Faxon*^{13a} would indicate that he will retain same as against the holder of a *recorded* void tax deed; that he need not "give any heed to the running of the Statute of Limitations."¹⁴

"An owner in possession, actual or constructive, may not be required to take notice of the running of the Statute of Limitations."¹⁵

There are, however, decisions which seem to hold to the contrary.¹⁶ This conflict in the authorities has been referred to by the courts.¹⁷

It has been held in the State of Wisconsin that constructive possession follows the recording of a tax deed valid on its face; that such constructive possession ripens into an absolute title when the lands remain vacant for the whole period specified in the State Statute of Limitations. An entry by the former owner destroys such constructive possession.¹⁸

This reasoning does not harmonize with that expressed in

13. *Munro v. Merchant*, 28 N. Y. 9.

Thompson v. Burhans, 61 N. Y. 52; 79 N. Y. 93, 99.

Wiechers v. McCormick, 122 A. D. 860; 107 N. Y. Supp. 835.

13a. 111 Misc. 699; 182 N. Y. Supp. 242.

14. *Clark v. Kirkland*, 133 A. D. 826, 35; 118 N. Y. Supp. 315; *af. 202 N. Y. 573*.

15. *People ex rel. McGuinness v. Lewis*, 127 A. D. 107, 10; 111 N. Y. Supp. 398.

16. *Bryan v. McGurk*, 200 N. Y. 332.

Peterson v. Martino, 210 N. Y. 412, 20.

Doud v. H. H. Co., 178 A. D. 748; 165 N. Y. Supp. 908.

17. *Meigs v. Roberts*, 162 N. Y. 371, 9.

18. *Cornell University v. Mead et al.*, 49 N. W. Rep. 815.

People v. Faxon.¹⁹ One in constructive possession must have a right of possession. To have a right of possession one must have title. As was pointed out by Judge Miller in *S. L. & T. Co. v. Roberts*,²⁰ a Statute of Limitations does not have the effect of transferring title but only bars a remedy.

So long as one holding a void tax deed stays out of actual possession, he has no title, no right to possession, no constructive possession. If he takes actual peaceable possession and is in such possession when the Statute of Limitations provided by the tax law has expired, he may successfully defend such possession when attacked by the former owner. It may be that he must remain in actual possession for twenty years under the twenty year Statute of Limitations in order to enable him to vacate with safety. Suppose the holder of a void tax deed vacates as soon as the tax law statute has expired and the former owner enters and that the tax deed holder brings an action against the former owner. It might be urged that the former owner having lost his constructive possession by an actual eviction and having remained silent until the statute had run, should not succeed. But it must be borne in mind that the holder of a void tax deed has no title; that the Statute of Limitations provided by the Tax Law is only a defense; that he may use it to bar a remedy—to defend an action, but that he may not use it to evict forcibly. The statute is a one-sided helper, *i. e.*, it will keep a man in possession when he is in, but it will not help him get in when he is out.²¹

Three questions confront the holder of a tax deed which may be void:

1. Must he make an actual peaceable entry?
2. If actual entry is necessary and he enters, will he lose the benefits thereof by vacating?
3. If actual entry is necessary and he may lose the benefits thereof by vacating, how long must he stay to insure his claim of title?

19. 111 Misc. 699; 182 N. Y. Supp. 242.

20. 208 N. Y. 288, 311.

21. *People v. Faxon*, 111 Misc. 699; 182 N. Y. Supp. 242.

The answer to the first question is that he must make an entry unless the recording of the tax deed alone is sufficient. He should make the entry.

He may lose the benefits of his entry by vacating. He certainly would if he vacated before the Statute of Limitations provided by the Tax Law expired.

He should stay until the statute has expired and he may not be safe in leaving even then, or until twenty years have elapsed.

All of these questions have not been finally settled by the decisions of the courts of this State.

Third. Possession by the State.

The foregoing are the rights as between individuals. The State is not in the same position as an individual for the reason that the State does not have actual possession.

It has been contended that because certain lands of the State have been placed under the jurisdiction, control and management of certain commissions or other creatures of the Legislature, the State thereby became vested with actual possession, although there was no actual occupation.

The Legislature has provided that the *State Comptroller* shall be deemed to be in the *actual* possession of certain lands which have been advertised. At the present time, such a provision exists as a part of the Tax Law. Section 133 thereof reads as follows:

“Possession of lands by the state. The comptroller may advertise once a week, for at least three weeks successively, a list of the wild, vacant and forest lands to which the state holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time, all such wild, vacant and forest lands are hereby declared to be and shall be deemed to be in the actual possession of the comptroller, and such possession shall be deemed to continue until he has been dispossessed by the judgment of a court of competent jurisdiction.”

Chapter 453 of the Laws of 1885 added Section 93 to Chapter 427 of the Laws of 1855 and made the first provision for advertis-

ing by the Comptroller. The provision was amended by Section 13 of Chapter 711 of the Laws of 1893, which was in form identical with the present law.²²

The courts have considered the question of possession by the State both constructive and actual, under the foregoing and other acts, but the decisions are not harmonious.

Judge Gray in *People v. Turner*,²³ stated that:

“The State was constructively in possession through the Comptroller’s purchase and deed. The effect was that the State had resumed its ownership of the land and its title thereto was assured, as the result of the proceedings, until invalidated by proof respecting the illegality of the proceedings leading to the tax sale.”

Referring to the Forest Commission, he stated that it had the care, control and supervision of the Forest Preserve within which were the lands in question. “The constructive possession which the State had acquired, I think, was made an actual possession by the powers and duties devolved upon the Forest Commission as its representative.”

*People v. Turner*²⁴ was decided in 1895. In 1909, Judge Gray also wrote the opinion in *Saranac L. & T. Co. v. Roberts*.²⁵ He qualified what he had said in the *Turner* case. To quote from the opinion:

“Undoubtedly, the State did take actual possession of the lands, which it claimed to own, through its commission for the specified and necessary purposes of control and supervision but it was not intended, in the opinion, to say that there was an actual possession by the commission, in the sense of an occupancy of the lands.”

22. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8429.

23. 145 N. Y. 451.

24. 145 N. Y. 451.

25. 195 N. Y. 303, 20.

The distinction between actual and constructive possession is found in *Brown v. Volkening*.²⁶

Apparently, there could not be an actual possession by the Forest Commission and at the same time an actual possession by the Comptroller under the section above quoted, as a result of an advertisement by the Comptroller.

Referring to possession as the result of an advertisement by the Comptroller, Judge Gray held ²⁷ that the act was intended to furnish a remedy to the land owner as against the State. Until the Comptroller had published, the individual could not sue to test the State's title under a tax deed. The publication of the advertisement opened the door and gave the land owner a day in court and enabled him to assert his claim against the State the same as he might against an individual.

The second opinion of Judge Gray was referred to by Judge Cullen in *People v. Inman*,²⁸ wherein he states that "when the comptroller advertises the lands * * * he becomes vested with the actual possession of the same so as to authorize an action to be brought against him."

If an action is authorized by reason of the advertisement, the Statute of Limitations might commence to run. But only the advertisement would set the statute running; not the record of the tax deed alone.²⁹

Judge Vann, formerly of the Court of Appeals, acting as a referee, in *People v. Raquette Falls Land Co.*, (not reported) pointed out that Section 133 of the Tax Law provided for the publication of a list of lands "to which the State holds title." He made a distinction between a title which is *held* and a title which is *claimed*.

26. 64 N. Y. 76, 80.

27. 195 N. Y. 303.

28. 197 N. Y. 200.

29. *Halsted v. Silberstein*, 196 N. Y. 1, 17.

CHAPTER XXXII.

Tax Law.— Procedure Under.*

Generally.

The "Tax Law" of the State of New York constitutes Chapter 60 of the Consolidated Laws, enacted as Chapter 62 of the Laws of 1909. There have been numerous amendments from 1909 to the present time. It is the outgrowth of many special and general acts with a view of providing a uniform method of assessment, taxation, collection and sale for unpaid taxes. In passing upon the validity of an assessment and the steps following same, it becomes necessary to examine the law in force at the time such assessment was made as well as the law governing the successive steps to and including the sale.

An owner of lands is primarily concerned with the following:

1. *The Amount of the Assessment.*

The assessors should give notice as to when and where the owner may be heard relative to the amount of the assessment. At the present time Section 36 of the Tax Law provides for notice and Section 37 for the hearing of complaints by assessors. Failure to give this notice would deprive an owner of an opportunity to be heard as to the value of his land.

Assessments may also be made by the board of supervisors, in certain instances, on notice to the property owner. (Section 57, Tax Law.)

2. *The Amount of Taxes Levied by the Board of Supervisors.*

This is fixed by the board under Section 58 of the Tax Law. The amount which each owner must pay is arrived at by multiply-

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8267.

ing the assessed value of his property by the rate adopted, having regard to any equalization. The rate is determined by dividing the total amount of taxes to be raised by the total assessed value. If \$10,000 is required and the assessed value of all property is \$1,000,000, the rate would be .01 per cent. If a parcel is assessed at \$5,000, the tax at .01 per cent would be \$50. Assume that in arriving at the sum of \$10,000, an illegal item of \$1,000 is included by the supervisors — that the amount to be raised should be only \$9,000. Then the rate would have been .009 per cent and the tax on the parcel named \$45 instead of \$50.

An example of such an illegal item is reported in *M. M. Co. v. W. R. Co.*¹

3. *Time and Place of Payment of Taxes.*

Section 69 of the Tax Law provides for the giving of notice by the collector. The notice must state when and where he will attend for the collection of taxes.

4. *Time and Place of Tax Sale.*

If an owner fails to pay a tax and if as a result of such failure the lands are to be sold, the owner should be notified as to when and where the sale will take place so that he may appear and pay his tax and save a sale of his lands to another.²

5. *Notice of Redemption.*

If lands have been sold for the non-payment of taxes, an opportunity to redeem might be and generally is afforded the owner. The present Tax Law (Section 130) ³ provides for the publication of a “notice of unredeemed lands.” The notice is intended to advise the owner that his lands have been sold but that he might, nevertheless, pay and redeem from such sale.

The Tax Law outlines in great detail the method of assessment, taxation, collection, sale, redemption, etc. The five steps men-

1. 142 N. Y. Supp. 1094.

2. See Section 120, Tax Law.

3. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 3, p. 8419.

tioned are the ones which are of most vital importance to the owner. Of these he is most concerned with the amount of his assessment and an opportunity to pay his tax, *i. e.*, notice of the time when and the place where he may pay.

The Constitution guarantees that his property shall not be taken without due process of law. A tax law must provide a process which will meet the constitutional guarantee. It may not be possible to specify what will satisfy the strict constitutional guarantee and not fall short of or exceed it.

There are certain steps that the Legislature must provide.

There are other steps that the Legislature may or may not provide.

As to the first, they must be strictly followed. Failure so to do places them beyond cure.

As to the second, *some* must be strictly followed. Failure so to do places them beyond cure. The failure to follow *others* results in irregularities only.

A tax law must contain certain vital requirements.

A tax law may contain other requirements which because of their existence makes them vital.

A tax law may contain still other requirements which do not become vital simply by reason of their existence.

The vital requirements are considered jurisdictional; the others not.

The difficulty is to properly classify each step in the law.

When a required step has been omitted in attempting to carry out the provisions of the law, the question arises whether the step was a vital one, *i. e.*—

First.— Whether it *must* have been provided.

Second.— Whether having been provided, it *must* be followed.

Third.— Whether it *might* have been omitted or varied.

If all of the steps provided by the Tax Law, whether vital or not, are taken, a tax deed following same will be valid and no question will arise.

But if one or more steps are not taken, a defect results. It then becomes important to determine as to the character of the defect. Is it

- (a) An irregularity, or
- (b) A jurisdictional defect?

If it is an irregularity only, it might have been cured or it might be cured.

If a jurisdictional defect, it cannot be cured.

A tax sale may be *illegal* by reason of a jurisdictional defect or an irregularity not cured.

A *void* or *voidable* tax deed may result.

The use of the terms illegal, void, voidable, bad and irregular, among others, has led to confusion.

Before the time when the Legislature provided for the curing of irregularities the distinction between such terms and jurisdictional defects was not important. A deed was equally invalid in either event.

Early decisions holding a tax deed void because some non-essential step was not taken are not controlling where an irregularity only exists, same having more recently occurred and having been cured.

Even the later decisions have not always drawn the distinction. An irregularity has been called a jurisdictional defect. An in-

stance is given by Judge Gray in *People v. Turner* (145 N. Y. 451, at page 457). He cites "the unguarded language of Chief Judge Ruger * * * who speaks of the irregular proceedings by the assessors as jurisdictional defects." He states that the proceedings of the assessors which were attacked were not jurisdictional defects, in any proper sense, but irregularities in the proceedings for the assessment of the tax.

This decision as well as *Ensign v. Barse*,⁴ *Wallace v. McEch-ron*,⁵ *People v. Inman*,⁶ *Bryan v. McGurk*,⁷ *S. L. & T. Co. v. Roberts*,⁸ *S. N. Bank v. City of N. Y.*⁹ and *People v. Golding*¹⁰ clearly shows that the distinction between jurisdictional defects and irregularities exist, although in *S. L. & T. Co. v. Roberts*,¹¹ the court stated that "much confusion of thought has been caused by attempts to draw distinctions between irregularities and so-called jurisdictional defects."

Whether the term "irregularity" or the term "jurisdictional defect" be applied to a failure to perform or to a misperformance of a step guaranteed by the Constitution or prescribed by the Legislature, may not be material. The final test is whether or not the Legislature could cure the failure to perform or the misperformance and whether the defect was such as to require a cure. The real difficulty is found in decisions holding contrary conclusions as to the same defect. The court held that as to the seven defects involved in *S. L. & T. Co. v. Roberts*,¹² "none of them are sufficient to vitiate the State's title even without the aid of a curative statute."

When called upon to determine the effect of a tax deed, it becomes necessary to examine at least a part of the procedure

4. 107 N. Y. 329, 36.

5. 176 N. Y. 424, 9.

6. 197 N. Y. 200, 9.

7. 200 N. Y. 332, 6.

8. 208 N. Y. 288, 304.

9. 213 N. Y. 457, 63, 64.

10. 55 Misc. 425, 106 N. Y. Supp. 821.

11. 208 N. Y. 288, at page 311.

12. 208 N. Y. 288.

leading up to and including the sale following which the deed was issued, for the purpose of ascertaining whether such procedure conformed to the Tax Law. As the Tax Law (Section 131) makes a tax deed *conclusive* after two years, as to the regularity of those proceedings which could be cured by the Legislature, it may not be necessary to give such particular attention to such proceedings which if defective could be cured. In other words, it may not be necessary to look for "irregularities" as above classified, if the deed has been issued for two years.

In some cases, however, the tax deed is not produced and has not been recorded so that a certified copy can be secured and produced in evidence. Without the deed or a certified copy thereof, there is no basis for a presumption or conclusion as to a proper procedure and there is no way of ascertaining what the tax deed contained or whether it was properly executed. The records in the Comptroller's office might afford some information.

NO PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.

Where there is no proof as to the performance of an official duty in connection with the assessment and sale of lands for unpaid taxes and where the defect is one which might be but has not been cured by statute, there is no presumption that the official duty was performed. To quote from *People ex rel. National Park Bank v. Metz*:¹³

"The presumption of the due performance of official duty which prevails in other cases is not applicable to matters of taxation involving a forfeiture of the ownership or right to possession of property, nor is there, in such cases, any presumption of the due performance of official acts based on mere lapse of time, when the act if performed would be a matter of record and there is no record of it and no evidence that one existed and has been lost or destroyed. (*Hilton v. Bender* (69 N. Y. 75); *People ex rel. Townshend v. Cady* (51 N. Y. Super. Ct. 316; *affd.*, 99 N. Y. 620.)"¹⁴

13. 141 A. D. 600, 10; 126 N. Y. Supp. 986.

14. 50 N. Y. Super. Ct. 399.

A presumption of performance of certain official duties is created by Sections 102, 131 and 132 of the Tax Law.

CHAPTER XXXIII.

Irregularities.*

- First. Curative Acts.
- Second. Statute of Limitations.
- Third. Estoppel and Waiver.
- Fourth. Sections 131 and 132, Tax Law.

Generally.

Whether an assessment may be void or only irregular and voidable was held as recently as 1915, by the Court of Appeals, in *Second National Bank v. City of New York*,¹ to be a "fundamental" question. This question was vigorously contested which indicates that unless the court of last resort has finally held a particular defect to be an irregularity, no certainty exists and no general rule governing same can be laid down excepting the rule hereinafter stated. The question there at issue was whether notice of the assessment must be provided for by statute and whether, if notice was provided for, it must be given. It was conceded that if the statute did not provide for a notice of the assessment, it would have been invalid. But, it was contended that if the statute had provided for a notice and that if there had been a failure to give the notice, the omission would be only an irregularity and not render the assessment void. Such a distinction was not found to exist. The provision for notice and the giving of notice were held to be fundamental and jurisdictional acts, necessary as a basis for depriving the taxpayer of his property. Although the assessment of lands was not involved, decisions affecting assessments of lands were cited in support of the conclusions reached. It was even stated that there was nothing in the opinion in *People*

* See also *NORE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 33, p. 382. B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8420.

1. 213 N. Y. 457, 62.

v. Turner,² "which seems intended to overthrow the principle here being discussed and asserted."

There are many known irregularities — known because the courts have specifically held them to be such. On the other hand, there are others unknown or as to which the courts are not agreed.

The opinion in *Jackson v. Rowe*,³ decided in 1905, citing the *Turner* case,⁴ seems to hold that a failure on the part of the assessors to subscribe the oath annexed to the assessment roll constitutes an irregularity. Five years later the Court of Appeals in *People v. Inman*,⁵ stated that the failure of the assessors to verify the assessment rolls was such a defect that a sale for unpaid taxes would give no title to the purchaser. The court was discussing the "principle" involved.

The general rule is stated in *Wallace v. McEchron*⁶ that:

"The Legislature may by subsequent enactment cure defects or irregularities in proceedings to impose a tax if they relate to requirements that the Legislature might in the first instance have dispensed with."

The rule was again stated in *Halsted v. Silberstein*⁷ as follows:

"The rule is that the Legislature, by a retrospective statute, may cure defects in legal proceedings which do not extend to matters of jurisdiction or are not void on constitutional grounds, if the defect is such as could be dispensed with by the Legislature in its original statute providing for the proceeding."

In *People v. Golding*⁸ a number of defects existed. They were discussed by the court and classified according to the decisions

2. 145 N. Y. 451.

3. 106 A. D. 65; 94 N. Y. Supp. 568; af. 191 N. Y. 512.

4. 145 N. Y. 451.

5. 197 N. Y. 200, 7, 9.

6. 176 N. Y. 424, 9.

7. 196 N. Y. 1, 14.

8. 55 Misc. 425; 106 N. Y. Supp. 821.

cited therein. Although the decision is not conclusive, it serves to indicate the possible defects which may be involved in any proceeding leading up to any tax sale.

Judge Cullen in *Wallace v. McEchron*,⁹ expressed the opinion that "It would require neither great ingenuity nor much reflection to suggest many other grounds that would render a tax sale void, yet would not be included in the cases specified in the statute."

The following are some of the defects which have been held to be irregularities although there may be a conflict of authority in certain cases:

1. Failure to express tax in dollars and cents.
2. Failure of assessors to sign roll and attach a specified certificate.
3. Failure in form of certificate of assessors.
4. Date of certificate of assessors — too early or too late.
5. Omission of number of road district; also of date of commissioner's warrant.
6. Failure to deliver notice of publication to printer as early as it should have been.¹⁰
7. Failure of assessors to certify land assessed was not subdivided.¹¹
8. Failure of assessors to subscribe the oath annexed to the assessment roll.¹²

9. 176 N. Y. 424, 9.

10. *Ensign v. Barse*, 107 N. Y. 329.

11. *Jackson v. Rowe*, 106 A. D. 65; 94 N. Y. Supp. 568; *af.* 191 N. Y. 512. *Cone v. Lauer*, 131 A. D. 193; 115 N. Y. Supp. 644.

12. *Jackson v. Rowe*, *supra*.

9. Neglect of justice of peace to affix his signature to a jurat.¹³

10. Oath to assessment roll taken before third Tuesday of August.¹⁴

11. Failure to affix county seal to tax warrant.¹⁵

12. Failure of assessors to make and attach to the roll the affidavit required by law.¹⁶

As an illustration of a seeming conflict of authorities, it has been held that although a taxing act which requires a valuation of property as a part of the procedure is unconstitutional unless it provides a grievance day, if a grievance day is provided and notice thereof not given the failure to give notice is an irregularity.¹⁷

The Court of Appeals later held to the contrary.¹⁸

No effort will be made to enumerate all of the defects which have been held to be irregularities only. Unless possible existing irregularities have been cured so that this class of defects is eliminated, a tax deed contains so many elements of uncertainty that it cannot be considered as having the effect of vesting a title with any degree of safety, especially if no entry is to be made under same, followed by continuous occupation.

First. Curative Acts.*

There were six irregularities involved in *Ensign v. Barse*.¹⁹ They were held to be cured by the act there mentioned. The con-

13. *Saranac L. & T. Co. v. Roberts*, 208 N. Y. 288.

14. *Saranac L. & T. Co. v. Roberts*, 208 N. Y. 288.

15. *People ex rel. Boenig v. Hegeman*, 220 N. Y. 118.

16. *Matter of Lamb*, 51 Hun, 633; *af. 121 N. Y. 703*.

But see *People v. Inman*, 197 N. Y. 200.

17. *People ex rel. B. S. B. v. Feitner*, 191 N. Y. 88, 100.

18. *S. N. B. v. City of New York*, 213 N. Y. 457, 62.

* See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 24, p. 265. B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8420.

19. 107 N. Y. 329.

stitutionality of the Curative Act was assailed as being retrospective in its operation but it was agreed by counsel on both sides and without particular criticism by the court that a retrospective statute may cure defects in their nature irregularities only and which do not extend to matters of jurisdiction.

The principle was stated in *Cromwell v. MacLean*²⁰ "that persons who take conveyances of land by deed, or under legal proceedings which lack validity by reason of some omission or informality, take a title or right subject to the power of the Legislature to cure such errors or defects by acts of retrospective legislation."

Applying this principle to a tax deed and to the irregularity in the proceedings following which it was issued, Judge Peckham, who delivered the opinion of the court, stated:²¹

"Yet even in this case I think the taxpayer must be given reasonable time in which to pay a tax thus validated * * * by the Legislature."

This expression casts doubt on the right to make a curative act instantly operative, but Judge Earl who presided with Judge Peckham, writing the opinion of the court, all judges concurring, in *Terrel v. Wheeler*,²² held that after the Legislature had passed an act confirming taxes theretofore imposed, no tax assessed before the passage of the act could be assailed on account of any irregularity.

That an act may "raise a conclusive presumption of regularity" was reiterated in *Joslyn v. Rockwell*.²³

A curative act was defined by Judge Cullen in *Meigs v. Roberts*,²⁴ and is found quoted in *Halsted v. Silberstein*.²⁵ The

20. 123 N. Y. 474, 89.

21. 123 N. Y. 474, 91.

22. 123 N. Y. 76.

23. 128 N. Y. 334, 8.

24. 162 N. Y. 371.

25. 196 N. Y. 1, 15.

distinction between a curative act and a Statute of Limitations is pointed out both with reference to irregularities and jurisdictional defects. Irregularities may be cured directly by a curative act. A Statute of Limitations may bar a remedy and in effect operate as a curative act as to an irregularity. To quote from the opinion: ²⁶

"A curative act in the ordinary sense of that term is a retrospective law acting on past cases and existing rights. The power of the Legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings. * * * But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a Statute of Limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right."

Section 131 of the Tax Law ²⁷ provides that a tax deed "shall vest in the grantee an absolute estate in fee simple"; that it shall be *presumptive* evidence as to the regularity of all proceedings; that after two years from the date of the tax deed such presumption shall be *conclusive*. This section is unlike Section 155 of the Tax Law which relates to a tax deed given by a county treasurer instead of by the Comptroller. Section 155 specifically authorizes a purchaser upon receiving a conveyance from the county treasurer to "possess and enjoy for his own use real estate described in such conveyance," etc. Section 131 does not refer to possession in any way.

Section 131 of the Tax Law was considered by Judge Miller in *Jackson v. Rowe*,²⁸ in which he construed it with relation to Section 132 of the Tax Law.

26. 196 N. Y. 1, 16.

27. See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8420.

28. 106 A. D. 65; 94 N. Y. Supp. 568; af. 191 N. Y. 512.

This section was again considered in *Adirondack League Club v. Keyes*.²⁹

The Legislature might legalize and confirm a tax sale and tax deed which would otherwise be illegal by reason of irregularities. An illustration may be found in Chapter 413 of the Laws of 1893, which legalized and confirmed an assessment containing irregularities in the method adopted by the board of supervisors of a county in estimating and setting down the respective sums to be paid as taxes.

Section 131 of the Tax Law by making a presumption conclusive, might operate as a curative act with reference to deeds issued two years before the enactment of the section. It could only operate as a Statute of Limitations after its enactment unless it could be considered a prospective curative act. The question might arise as to whether the mere issuance of a conveyance by a Comptroller would start a Statute of Limitations running. It was held in *Bryan v. Mc Gurk*,³⁰ that it would not.

Judge Cullen in *Wallace v. McEchron*³¹ called attention to the fact that earlier enactments of a similar character have been viewed both as curative acts and as Statutes of Limitation. To quote from the opinion:

“It is to be observed, however, that none of them has been enacted in the ordinary form either of a curative act or of a statute of limitations. In terms they provide that after a certain lapse of time and in certain contingencies a Comptroller’s deed shall be conclusive evidence of certain facts. It, therefore, becomes necessary when any case involving the construction and effect of one of these statutes is presented to closely scrutinize and carefully analyze the statute to see whether as to such case the statute applies, and if applicable, whether its operation is that of a curative act or of a Statute of Limitations.”

29. 122 A. D. 178; 106 N. Y. Supp. 963.

30. 200 N. Y. 332, 9.

31. 176 N. Y. 424, 7.

Judge Cullen wrote again in *Bryan v. McGurk*³² and stated that the provisions of the Tax Law when applied to the past, operated only as curative acts.

What the Legislature attempted to do by Section 131 in the way of making a deed conclusive, it apparently destroyed by Section 132, so far as defects other than irregularities are concerned, and again opened the door to an action on the recording of a tax deed. This is the conclusion reached in *Jackson v. Rowe*³³ cited by Judge Williams in *A. L. C. v. Keyes*.³⁴

From the foregoing the conclusion may be reached that Section 131 of the Tax Law *may* have the effect of curing irregularities occurring *before* its enactment. The record of a tax deed would, under Section 132, only open the door to an action in one of the three cases specified in that section, none of which include irregularities.

As to irregularities occurring *after* its enactment, opinions are conflicting:

Section 131 was held to be "a Statute of Limitations and a bar to an action," in *Jackson v. Rowe*,³⁵ citing *Meigs v. Roberts*.³⁶

Similar language found in the first part of Section 132 of the Tax Law was construed by Judge Cullen in *Wallace v. McEchron*,³⁷ who stated that:

"No one would contend that the law could be upheld as a statute of limitations."

32. 200 N. Y. 332.

33. 106 A. D. 65; 94 N. Y. Supp. 568; af. 191 N. Y. 512.

34. 122 A. D. 178; 106 N. Y. Supp. 963.

35. 106 A. D. 65, 70; 94 N. Y. Supp. 568; af. 191 N. Y. 512.

36. 162 N. Y. 371.

37. 176 N. Y. 424, 28.

Under Section 131

a tax deed becomes conclusive after two years from its *date*, "that the sale and all proceedings prior thereto, from and including the assessment of lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all the provisions of law relating thereto."

Under Section 132

a tax deed becomes conclusive after two years from its *record*, "that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption were regular and were regularly given, published and served according to the provisions of all laws directing and requiring the same or in any manner relating thereto."

It is to be noted from the foregoing that there is no particular distinction between the language found in Section 131 of the Tax Law and the language found in Section 132 of the Tax Law with respect to the conclusiveness of a conveyance relative to irregularities, excepting that under Section 131 the *date* and issuance of the deed is the vital step whereas under Section 132 the *record* thereof is made the vital step.

If Section 131 could not be considered a Statute of Limitations with respect to irregularities appearing after its enactment, following the reasoning of Judge Cullen in *Wallace v. McEchron*,³⁸ it might be treated as a *prospective* curative act. But, it has already been pointed out that Judge Cullen in *Meigs v. Roberts*³⁹ held a curative act to be a *retrospective* law acting on past cases and existing rights.

James M. Gray in his work on Limitations of the Taxing Power, published in 1906, referred to this New York legislation as "curative laws" "both retrospective and prospective; that is, they validate past acts and make provision for future errors."

38. 176 N. Y. 424.

39. 162 N. Y. 371.

As a prospective statute, it is the same as if the Legislature had said that if any of the steps prescribed by it should not be taken, resulting in irregularities only, such "errors, omissions or imperfections" should be ignored and would not invalidate the proceedings.

Whether or not an unrecorded tax deed may by virtue of its issuance and existence alone, immediately or after a stated time, be so conclusive as to effect a cure of any irregularity, same would be cured by the record of the deed as provided by Section 132 of the Tax Law.

Second. Statutes of Limitation.*

If in any case Sections 131 and 132 of the Tax Law would not operate as a curative law either retrospective or prospective, they might operate as Statutes of Limitation. It was argued with a great deal of force in *People v. Faxon et al.*,⁴⁰ that a Statute of Limitations barred a remedy only and served as a defense to one who was attacked; that no rights are created and no questions of title settled thereby. This would indicate that the holder of a tax deed would have to take actual possession and that an action would have to be brought against him when he might plead the statute. It would not indicate that he could take advantage of the statute to force an entrance.

In this connection the opinion in *People ex rel. McGuinness v. Lewis*⁴¹ is of interest. To quote:

"Section 131 is prospective; it enacts a rule of evidence in respect of future deeds, and, so far as the question now under consideration is concerned, a Statute of Limitations of two years;" * * *

"Said Section 132 is retrospective, it enacts a rule of evidence in respect of former deeds, and in its present form was obviously intended to be a curative act in respect of ir-

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, pp. 8420 and 8425. Wood on Limitations, 4th Ed.

40. 111 Misc. 699; 182 N. Y. Supp. 242.

41. 127 A. D. 107, 12; 111 N. Y. Supp. 398.

regularities which the Legislature supposed could thus be cured."

Notwithstanding the conclusion that these two sections operate as a rule of evidence and a Statute of Limitations, on page 117,⁴² is found the following:

"I think that by * * * Section 132 of the Act of 1896 the Legislature intended to pass a curative act applying to every irregularity within the reach of such an act, and to except from the provisions of those sections as well as from the provisions of Section * * * 131 of the Act of 1896, actions based on the three specified grounds, which were supposed to include every ground not within the reach of a curative act, and in respect of those to enact a Statute of Limitation by the proviso quoted."

Third. Estoppel * and Waiver.

It has been held that one may be estopped from asserting the invalidity of the proceedings resulting in a tax deed and that he might have waived any irregularities in such proceedings; that he may be estopped by his acts from asserting an absence of authority or the invalidity of a proceeding.⁴³

The principle of estoppel was considered and held to be based on fraud, or something which operates as such in *Livingston v. N. Y. O. & W. R. Co.*,⁴⁴ so that the acts complained of as a basis for the estoppel must have amounted to a fraud on the part of the one claiming the invalidity of the tax deed. In this case, it was held that one had not acted fraudulently by simply "remaining quiet."

But see *Levinson v. Myers*.⁴⁵

42. 127 A. D. 107, 17; 111 N. Y. Supp. 398.

* See also *NORE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 26, p. 634.

43. *Jackson v. Rowe*, 106 A. D. 65, 72; 94 N. Y. Supp. 568; *af.* 191 N. Y. 512.

44. 193 A. D. 523, 8; 184 N. Y. Supp. 665.

45. 100 Misc. 379; 166 N. Y. Supp. 703.

Fourth. Sections 131 and 132 Tax Law.*

A knowledge of the origin and growth of these curative provisions and Statutes of Limitation as applied to any particular tax proceeding, sale and deed may be helpful.

Section 65 of Chapter 427 of the Laws of 1855, passed April, 1855, read as follows:

“Such conveyance shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor general or treasurer, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto.”

Chapter 448 of the Laws of 1885 amended Section 65 of Chapter 427 of the Laws of 1855 very substantially and contained provisions for making the conveyances conclusive evidence and also contained a Statute of Limitations. This Act of 1885 applied only to the fifteen counties named therein, whereas the Act of 1855 applied to practically the whole State outside of the City and County of New York.

Chapter 217 of the Laws of 1891 extended the Act of 1885 to all but two counties of the State.⁴⁶

Chapter 711 of the Laws of 1893 repealed Section 65 of the Laws of 1855, as amended in 1885, but re-enacted Section 65 with a few changes as two sections numbered 11 and 12.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, pp. 8420 and 8425.

46. See People *ex rel.* McGuinness v. Lewis, 127 A. D. 107, 15; 111 N. Y. Supp. 398.

Chapter 908 of the Laws of 1896, constituting Chapter 24 of the General Laws, repealed Chapter 711 of the Laws of 1893, but re-enacted with a few changes Section 11 giving it a new number, Section 131, and also re-enacted Section 12, giving it a new number, Section 132.

Chapter 62 of the Laws of 1909, constituting Chapter 60 of the Consolidated Law, repealed Section 132, but re-enacted said section with only one slight change.

Section 132 is substantially the same to-day as in 1896.

Attention is particularly called to the fact that the Act of 1855, as amended by the Act of 1885, is limited to irregularities in assessments of *nonresident* lands, or lands returned to the Comptroller as nonresident lands.

See Article 5 of the Tax Law — “Collection of Nonresident Taxes.”

CHAPTER XXXIV.

Jurisdictional and Other Defects.

- First. Defects on Constitutional Grounds.
- Second. Due Process of Law.
 - A. Opportunity to be Heard.
 - B. Notice.
 - C. Statutory Requirements.
- Third. Classification of Defects.
 - A. Irregularities.
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- Fourth. Defects Not Within Section 132 of the Tax Law.
 - A. No Basis in Fact for Sale.
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- Fifth. Defects Within Section 132 of the Tax Law.
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 - 5. No Legal Right to Assess.
 - 6. Failure to Assess Known Lots.
 - 7. Failure to Verify Tax Rolls.
 - 8. All Assessors Must Act.
 - 9. Double Assessment.
 - 10. Re-assessment Without Notice.
 - B. Failure to Give Taxpayer Notice.
 - 1. About Original Tax.
 - 2. Of Re-levy of Tax.
 - 3. By School Trustees.
 - C. Failure of Supervisors to Extend Tax.
 - D. Payment of Tax.

It has been pointed out that a tax deed may be voidable by reason of an irregularity in the proceedings leading up to the sale on which the deed is issued; that an irregularity results from the failure to perform a prescribed legislative act which might have been dispensed with by the Legislature in the first instance, or the doing of such an act in an irregular way; that an irregularity may be cured.

A tax deed may also be void by reason of a jurisdictional or other defect which cannot be cured.

Attention is first directed to a discussion of the words "jurisdiction" and "jurisdictional" in a dissenting opinion by Judge Putnam in *Marsh v. N. P. A.*¹ He stated as follows:

"The word 'jurisdiction' has been used in various senses in the authorities. This is adverted to in the opinion of Gray, J., in *People v. Turner*.² In *Ensign et al. v. Barse et al.*,³ on the motion for a re-argument, Finch, J., referring to the opinion delivered in that case, said: 'In the opinion then delivered the defect was not deemed jurisdictional in any other sense than the modified one of an essential condition under the law *as it stood*. Whether it was so jurisdictional as that the Legislature could not have dispensed with it, and, therefore, could not cure its omission, is a very different inquiry. A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under an existing law, and yet not so as it respects the power of the Legislature to pass a statute curing the defect.' In that case it was determined 'that a retrospective statute curing defects in a legal proceeding where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds; that if the thing wanting or omitted, which constitutes the defect is something, the necessity for which the Legislature might have dispensed with by prior statutes, or if something has been done in a particular way

1. 25 A. D. 34, 41, 48; 49 N. Y. Supp. 384.

2. 145 N. Y. 451.

3. 107 N. Y. 329.

which the Legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute.' ”

It would seem that a defect should be regarded as jurisdictional or not jurisdictional and that there should be no shading of the word or question as to its meaning so as to result in a defect *slightly* jurisdictional — a mere irregularity which may be cured, or a defect *fatally* jurisdictional and beyond cure.

Section 132 of the Tax Law indicates that there may be a “defect in the proceedings affecting the jurisdiction upon *constitutional grounds*.”

This raises a question as to whether there may be a defect in the proceedings affecting the jurisdiction upon *other than* constitutional grounds or defects *other than* jurisdictional.

It would appear as if a distinction has also been made in the same section between a defect in the proceedings affecting the jurisdiction upon constitutional grounds, on the one hand, and the payment of taxes or the levying of taxes by a town or ward having no legal right to assess the land, on the other hand.

In *People v. Hegeman*,⁴ the last named distinction is not made. There is a statement to the effect that the payment of a tax for which the sale was made or the attempt to levy taxes by a town having no right to assess the land were jurisdictional defects “under constitutional principles.” It is to be observed, however, that the question was not before the court and that the remarks were *obiter*.

First. Defects on Constitutional Grounds.

At the outset it becomes necessary to consider a defect upon constitutional grounds and the constitutional guarantees.

As a fundamental proposition, the State in its sovereign capacity possesses the right to tax property for public purposes. It is not necessary that the Legislature perform all of the details inci-

4. 220 N. Y. 118, 21.

dent to the levying and collection of taxes but such powers may be delegated to subordinate bodies and officials created by the Legislature.

If an official is charged with the duty of ascertaining the value of the property to be taxed, he acts judicially.⁵

These judicial acts are prescribed by Article 2 of the Tax Law, which may be reviewed as provided in Article 13 of the Tax Law.

The board of supervisors in completing and certifying an assessment roll also act judicially.⁶

The collection of the tax is an administrative and not a judicial act.⁷

Second. Due Process of Law.

In exercising its taxing power and in collecting taxes or selling property for the nonpayment of taxes, no person shall be deprived of his property without "due process of law." Both the Federal and State Constitutions guarantee that property shall not be taken for any purpose without "due process of law."⁸

The last case cited⁹ discussed the subject of "due process of law" at length and also the "fundamental principle" involved. It was observed that by "due process" is meant that:

Wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard

It must be pursued in the ordinary mode prescribed by law

It must be adapted to the end to be attained.

5. Hagar v. R. D. No. 108, 111 U. S. 701, 710.

6. People v. Hagadorn, 104 N. Y. 516, 22.

7. McMahon v. Palmer, 102 N. Y. 176, 89.

8. U. S. Const., 14th Amendment.

N. Y. State Const., Art. I, Section 6.

Hagar v. R. D. No. 108, 111 U. S. 701.

9. 111 U. S. 701.

A. OPPORTUNITY TO BE HEARD.

The courts of this State have also held that a property owner is entitled to an opportunity to be heard.¹⁰

Some of the steps as to which a property owner should have an opportunity to be heard were considered in *Overing v. Foote*¹¹ and *Remsen v. Wheeler*.¹²

The distinction between personal liability and a lien on land as a result of an assessment, with reference to the right to be heard, was fully discussed in *Clark v. Kirkland*.¹³

B. NOTICE.

"Due process of law," and the essential elements thereof, was discussed at length in *Gilman v. Tucker* (128 N. Y. 190). One of the elements considered was *notice* to the party whose property is to be affected. Without notice there is no opportunity to be heard.

Notice has been defined as a "means of knowledge."¹⁴

A law may designate the time and place where parties may contest the valuation of their property and such law has been considered to be a sufficient notice.

Section 36 of the Tax Law fixes the *day* when the assessors shall hear complaints as to the valuation. The *hour* and *place* must be fixed by notice.

A notice need not be personal, but may be given by publication. It has been held that notice may be given in any manner "by which it is reasonably probable that the person proceeded against will be apprized of what is going on against him and an opportunity to defend."¹⁵

10. *Stuart v. Palmer*, 74 N. Y. 183.

McMahon v. Palmer, 102 N. Y. 176.

11. 65 N. Y. 263.

12. 105 N. Y. 573.

13. 133 A. D. 826; 118 N. Y. Supp. 315; *af.* 202 N. Y. 573.

14. *Matter of Union E. R. R. Co.*, 112 N. Y. 61.

15. *Haffy v. Mosher*, 48 N. Y. 313.

In general, what the statute has made a sufficient mode of notice must be deemed to be so.

Whether or not a notice to redeem is necessary under the constitutional guarantee might depend somewhat upon the notice or notices previously provided for. There is some authority for the proposition that a notice to redeem is necessary. In any event, the present Tax Law provides for such a notice.¹⁶

C. STATUTORY REQUIREMENTS.

In addition to notice and the opportunity to be heard, "due process," as pointed out, requires that the main features of the statutory requirements "be pursued in the ordinary mode prescribed by the law."

It has been urged at times that the right to be heard and to have notice are rights derived *directly* from the Constitution but that there is a class of rights arising out of the statutory taxation system *regardless* of the Constitution. The theory advanced is that the Legislature having provided a system of taxation and having provided for certain proceedings as safeguards upon which the owner is entitled to rely, they assume the proportion of constitutional jurisdictional requirements, although not specifically required by the Constitution; that it would be "due process" without them, but, being provided, they become a part of the process necessary to make "due" process, but not that required by the Constitution.

If the Constitution requires that the process prescribed by law must be pursued in the ordinary mode so prescribed, it would not be deemed "due process" to ignore the statutory requirement. It is, therefore, difficult to conceive that such a statutory jurisdictional requirement is not a specific constitutional requirement or that there is any particular distinction between the two.

Although notice of two steps out of three might be sufficient, if the law requires *notice* of all three steps, notice must be given

16. Section 130, Tax Law.

or there is not "due" process. The questions of jurisdiction and of constitutional guarantee immediately arise.

But the notice required, must be of a vital step affecting a substantial right. To illustrate: notice of a time and place when and where a tax may be paid. There would be no object in giving notice when and where the assessors would verify a roll. If such a notice should be required, the failure to give same would not be fatal; it would be an irregularity only.

Although "due process" was defined in the Hagar case,¹⁷ it was held that it may be difficult to define it with precision so as to cover all cases; that it was no doubt wiser to arrive at its meaning "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."¹⁸

Third. Classification of Defects.

Under the United States decision,¹⁹ the following classifications would seem to result:

A. The omission of certain steps may amount to irregularities only and make a tax deed voidable.

B. Certain other steps are *directly* guaranteed by the Constitution and due process of law makes them necessary; others, when prescribed by the Legislature, become just as necessary. A defect in either becomes jurisdictional on constitutional grounds.

C. There may be other defects which come within neither of the two classes mentioned and which will make a tax deed void.

Wallace v. McEchron²⁰ in considering a defect held that the defect involved in that case, and which it was held rendered the

17. 111 U. S. 701.

18. 111 U. S. 701, 7, 8.

19. 111 U. S. 701.

20. 176 N. Y. 424.

tax sale void, was not a defect in the proceedings on constitutional grounds. The court stated that it would require neither great ingenuity nor much reflection to suggest many other grounds that would render a tax sale void, yet which would not be void as a defect in the proceedings on constitutional grounds. This was in addition to those defects which are less than jurisdictional and which amount only to irregularities which may be cured.

A defect under Section 132 must be:

- A defect in the proceedings
 - affecting the jurisdiction
 - upon constitutional grounds.

From the foregoing, it appears that there may be:

A defect in the proceedings or a defect not in the proceedings; also

A defect affecting the jurisdiction or not affecting the jurisdiction; also

A defect upon constitutional grounds or not upon constitutional grounds.

This would indicate a possibility of six classes of defects. This number may be grouped, however, so that there would be two classes of fatal defects:

One, defects in the proceedings affecting the jurisdiction upon constitutional grounds; and

Another class difficult to define.

In *Wallace v. McEchron*,²¹ an effort was made to pay taxes in full. One item was left out by the Comptroller and not paid through no fault of the owner. The property was sold for this item. The court held that "the thing" which rendered the tax sale void, was not a defect in the proceedings affecting the jurisdiction upon constitutional grounds and so not covered by Section

21. 176 N. Y. 424, 7.

132 of the Tax Law. It is not claimed that there was any "defect in the proceedings." These were apparently regular. "The thing" which made the tax sale void was that the Comptroller had no jurisdiction or right to sell because he had failed to advise of the tax when interrogated as to same. He surely had a duty to advise of the non-paid tax when he was asked if there was such a tax, and to take payment of same if offered.

Wallace v. McEchron²² was cited in Bryan v. McGurk,²³ which involved a similar question. It was there held that "this was plainly a jurisdictional defect."

The distinguishing feature of these two cases must be that "the thing" which made the tax sale void was not a "defect in the proceedings" but a defect outside of the proceedings, although it was jurisdictional.

Judge Miller in *People ex rel. McGuinness v. Lewis*,²⁴ referred to Wallace v. McEchron.²⁵ His conclusion was that Section 132 of the Tax Law was "intended to include every jurisdictional defect."

In order to harmonize these decisions, the defects in the Wallace²⁶ and Bryan²⁷ cases must have been defects *not* in the proceedings.

Fourth. Defects Not Within Section 132 of the Tax Law.

There are other "things" which might be called defects which have been held not to come within the provisions of Section 132 of the Tax Law, although some of them have been held to be jurisdictional.

A. Such a defect might be one which establishes no basis in fact for the *sale* and the deed issued pursuant thereto.

22. 176 N. Y. 424.

23. 200 N. Y. 332, 6.

24. 127 A. D. 107, 17; 111 N. Y. Supp. 398.

25. 176 N. Y. 424.

26. 176 N. Y. 424.

27. 200 N. Y. 332.

B. Such a defect might be one which establishes no basis in fact for the *deed*.

C. The *deed* might be void on its face and so no deed in form or fact.

D. The *deed* might be void because of the absence of a concurrent act required by law.

A. THERE IS NO BASIS IN FACT FOR A SALE IN ANY OF THE FOLLOWING CASES:

1. Where a public officer (collector, county treasurer or comptroller) fails to report an unpaid tax on inquiry as to same.

In *Wallace v. McEchron*:²⁸

The trial court found that "one Munn, then the mortgagee or owner, applied to the Comptroller of the State for a statement of the unpaid taxes upon the property and that the Comptroller rendered one to her which 'puported to contain a statement of all taxes due on said property, but in fact did not contain a statement of said road tax.' Munn paid all the taxes so returned to her by the Comptroller and obtained from him a receipt in full."

Held: "The sale of the lands to Curtis and Baker was, therefore, void as against the plaintiffs."²⁹

2. Where there is such a defect in the assessment that the Statute of Limitations will not operate.³⁰

The decision last cited seems to strike at the heart of what was sought to be accomplished by Section 132 of the Tax Law.

3. Where there is a sale of land for unpaid taxes, including unpaid taxes against other lands, not re-assessed against such other lands.³¹

28. 176 N. Y. 424.

29. See also *VanBenthuyssen v. Sawyer*, 36 N. Y. 150.

People v. Registrar of Arrears, 114 N. Y. 19.

Bryan v. McGurk, 200 N. Y. 332.

30. *Clark v. Kirkland*, 133 A. D. 826, 35; 118 N. Y. Supp. 315; *af.* 202 N. Y. 573.

31. *M. M. Co. v. W. R. Co.*, 142 N. Y. Supp. 1094.

4. Where there is a sale of land for rejected taxes not re-assessed. *People v. Golding* ³² held:

"As required by statute, the Comptroller did reject the tax of 1867 because of imperfect description; also the tax of 1871 because the description was erroneous; also the tax of 1872 for a like reason. There was never any re-assessment or return thereof to the Comptroller from the county treasurer, yet the lands were sold for the taxes of those three years, with other years. The title of the owner was not thereby divested. *Nehasane Park Assn. v. Lloyd*, 167 N. Y. 431, 437."

B. THERE IS NO BASIS IN FACT FOR A DEED IN EITHER OF THE FOLLOWING CASES:

1. Where the Comptroller has withdrawn lands from public bidding.

Turner v. Boyce ³³ held:

"But these two deeds are also valueless as grants of any right or title to the land in them described, for the reason that no sale in fact was made by the Comptroller to the State of these lands at the time a pretended sale is referred to in them." The Comptroller "refused to receive bids therefor." ³⁴

2. Where the description inserted in the deed is so indefinite and uncertain that the lands are not capable of being identified.

The subject of indefinite and uncertain descriptions will be discussed under a separate heading and various illustrations of indefinite and uncertain descriptions will be given. (Page 547.)

C. THERE IS NO DEED IN FORM OR IN FACT WHERE THERE IS AN OMISSION OF A NECESSARY OFFICIAL SIGNATURE OR SEAL.

Lockwood v. Gehlert ³⁵ held:

^{32.} 55 Misc. 425; 106 N. Y. Supp. 821.

^{33.} 11 Misc. 502.

^{34.} See also *Andrus v. Wheeler*, 29 Misc. 412; 61 N. Y. Supp. 983. *Saranac L. & T. Co. v. Roberts*, 195 N. Y. 303.

^{35.} 127 N. Y. 241.

"It is contended that the seal is unnecessary and that the provision for its use is merely directory. It is mandatory in form, for the statute commands that the Comptroller 'shall, under his hand and seal, certify to the fact.' If not mandatory as to the seal, is it mandatory as to the signature? If the courts, by construction, may dispense with the one, why may they not dispense with the other or with both? * * * When the statute provides that a seal shall be used, we have no power to adjudge that a signature, without a seal, is sufficient."³⁶

D. THERE IS NO DEED IN FACT, ALTHOUGH SAME MAY BE IN PROPER FORM AND PROPERLY EXECUTED AND RECORDED, IN CASE THE LAND DESCRIBED THEREIN IS OCCUPIED AND NO NOTICE SERVED PURSUANT TO SECTION 134 OF THE TAX LAW.*

One of the earlier cases involving this question is *People v. Ladew*.³⁷ When the tax deeds were placed on record the lands described therein were occupied. Section 132 of the Tax Law was held not to apply to an omission to serve the occupant. Respecting this section the court said:

"Even if we give to this provision the broadest possible effect it plainly cannot apply to a record which was wholly void."

The record of the tax deeds was held to be a "nullity." Doubt was also expressed as to whether "the record of a hostile conveyance in the county clerk's office was sufficient to set a statute of limitations running" against one in actual possession so as to destroy his title.

The case was reconsidered³⁸ and the decision followed in *Ostrander v. Reis*,³⁹ which involved earlier acts requiring similar notice.

36. See also *People v. Hegeman*, 220 N. Y. 118.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8430.

37. 189 N. Y. 355, 60.

38. 190 N. Y. 543.

39. 206 N. Y. 448.

The question arose again in *Nicholas v. Kellas*.⁴⁰ It was there held that "land may be in the possession or occupancy of a person within the meaning of a statute, although he resides elsewhere." * * * "Whenever there is a subjection of land to the will and control of another with title in him, it is occupied by that other. It is in the actual legal possession of that other." Actual possession or occupation of a portion of a lot conveyed by the Comptroller constitutes possession or occupation of all.

It is to be noted that this decision has a very far reaching effect. It might be urged under this decision that there is an occupancy even though there is no person actually on the land. This borders very closely to a constructive possession.

The court went further in *City of New York v. Nunez*,⁴¹ and held that the certificate by the Comptroller provided for by Section 135 of the Tax Law, relative to the service of notice, was not even *prima facie* evidence of the service of the notice. The notice must have *in fact* been served.⁴²

E. OTHER DEFECTS MAY BE ADDED TO THE FOREGOING CLASSIFICATIONS AND MIGHT NOT BE SUCH DEFECTS IN THE PROCEEDINGS AS TO BRING THEM WITHIN SECTION 132 OF THE TAX LAW.

In *Saranac L. & T. Co. v. Roberts*,⁴³ it was stated that "when the State proceeds at one time to sell land for unpaid taxes levied during a series of years, some of which are valid and others are invalid, the title of the owner against whom the sale is made is not thereby divested. By mingling good and bad together the State cannot give a valid title to the property thus assessed."

The question arises as to the meaning of the words valid and invalid, good and bad.⁴⁴

40. 90 Misc. 432; 154 N. Y. Supp. 22; *af. on opinion below*, 173 A. D. 923.

41. 101 Misc. 375; 166 N. Y. Supp. 1049.

42. See also *People v. Baker*, 180 A. D. 275; 167 N. Y. Supp. 591; 183 A. D. 909.

Matter of Morse, 189 A. D. 803; 179 N. Y. Supp. 295.

43. 195 N. Y. 303, 11.

44. See also *People v. Hagadorn*, 104 N. Y. 516.

People v. Baker, 180 A. D. 275; 167 N. Y. Supp. 591; 183 A. D. 909.

In making any classification of defects in tax sales, only general principles can be followed. Consideration cannot be given to the peculiar equities of any particular case which may result in a decision making a new or different classification.

The conflict between the Legislature and the courts has been frequently referred to. It was discussed in *People v. Lewis*.⁴⁵

The Legislature has apparently tried to make tax deeds just as effective as possible. It has attempted by Statutes of Limitation to do in effect what it could not do directly. If an injustice has resulted to a property owner, the courts have tried to distinguish the defect pointed out to it and have frequently held that the statute did not apply.

Fifth. Defects Within Section 132 of the Tax Law.*

The following defects have been grouped and classified as jurisdictional on the theory that what the Constitution guarantees is jurisdictional. It is assumed that they come within the class of defects stated in Section 132 of the Tax Law:

A. DEFECTS IN THE ASSESSMENT.

1. *Non-resident Land Assessed as Resident.*

When assessed as resident the land is not assessed, but the assessment is against the individual and creates a personal liability rather than a lien upon the land. So when non-resident land is not assessed as such, but is assessed as resident, there is no assessment against the land and the assessment is void.⁴⁶

Chapter 427 of the Laws of 1855 and Chapter 448 of the Laws of 1885 provided only for the sale of non-resident lands or lands finally assessed as non-resident lands.⁴⁷

45. 127 A. D. 107; 111 N. Y. Supp. 398.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8425.

46. See *People v. Wemple*, 117 N. Y. 77.

Sanders v. Downs, 141 N. Y. 422.

Hagner v. Hall, 10 A. D. 581; 42 N. Y. Supp. 63; af. 159 N. Y. 552.

Clark v. Kirkland, 133 A. D. 826; 118 N. Y. Supp. 315; af. 202 N. Y. 573.

47. See *Newman v. Supervisors*, 45 N. Y. 676.

2. *Non-resident Land Assessed by First Inserting Name of Non-resident Owner in Non-resident Part of Roll.*⁴⁸

In *Sanders v. Downs*⁴⁹ it was held:

"The statute forbids the insertion of the name of the owner in the first column. * * * There certainly can be no objection to the insertion of the name of the non-resident owner of lands in the second column for the purpose of describing or identifying the lands, and in many cases that may be necessary. But the difficulty with this assessment is that it was made in such form as to leave it open to doubt, at least, whether the plaintiff's name is in the first column as a part of the description of the land, or for the purpose of including him among the taxable inhabitants."⁵⁰

*Doud v. Huntington Hebrew Congregation*⁵¹ held:

"The assessment was against the person and not against the land. The sale was void for jurisdictional defect."

3. *Resident or Occupied Land Assessed as Non-resident.*

A distinction exists between "unoccupied" and "non-resident" lands. The former when belonging to a *resident* of the tax district should be assessed as *resident* land.⁵²

*Turner v. Boyce*⁵³ held:

"The land was assessed as non-resident during all the years in which taxes were levied for which sale was made, while in fact during all those years it was occupied by a resident occupant. The assessment was, therefore, void and cannot furnish support for a sale."

In *People v. Lewis*⁵⁴ a tract of land was subdivided into lots.

48. *People v. Wemple*, 117 N. Y. 77, 84.

49. 141 N. Y. 422, 425.

50. See also *Cromwell v. MacLean*, 123 N. Y. 474.

51. 178 A. D. 748; 165 N. Y. Supp. 908.

52. See *People ex rel. Vanderveer v. Wilson*, 125 N. Y. 367.

53. 11 Misc. 502; 33 N. Y. Supp. 433.

54. 127 A. D. 107; 111 N. Y. Supp. 398.

Part was owned by Henry McAllister, a resident of the tax district; another part thereof was owned by Alfred C. Meade, a non-resident of said district, but it was all assessed as one parcel to said Alfred C. Meade. It was held that such a defect is plainly a jurisdictional defect.⁵⁵

The reasons why resident or occupied land should not be assessed as non-resident land were fully set forth in *Clark v. Kirkland*.⁵⁶ It was stated that:

By the enforcement of the tax levy the owner of the property assessed is deprived of his property without his consent and the requirements of the statute in their substance must be strictly complied with.

Continuing, the court said:

"Where the land of a resident is assessed as non-resident the rule adverted to applies in its full scope. The resident is entitled to notice of the various proceedings and has an opportunity to be heard, and of this important right he may be deprived if the land is placed upon the roll as non-resident real property. * * * It seems to us the land should have been assessed to the resident owner. It is the purpose of the taxing law to reach the individual owner primarily. The assessment of property as non-resident lands is the last resort. * * * There must not be a resident owner; and if there is an occupant he must reside out of the district. It is apparent, therefore, that the lawmakers were hedging about the assessment of lands in order to protect the owner by an assessment which would insure him all the notices and safeguards which are required in the tax law. * * * Assessment to an occupant or owner is the very essence of the taxing statute. Failure to comply with this

55. See also *Stewart v. Crysler*, 100 N. Y. 378.

People v. Wemple, 117 N. Y. 77.

Joslyn v. Rockwell, 128 N. Y. 334.

Halsted v. Silberstein, 196 N. Y. 1, 7.

People v. Hegeman, 220 N. Y. 118, 121.

Clark v. Kirkland, 133 A. D. 826; 118 N. Y. Supp. 315; af. 202 N. Y. 573.

56. 133 A. D. 826; 118 N. Y. Supp. 315; af. 202 N. Y. 573.

provision might result in depriving him of his property without due process of law, and a statute which assumes to grant any such power is violative of the Constitution."

(a) Exceptions.

Although lands are to be assessed in the first instance as "resident" or "non-resident," the distinction is not thereafter made in case a resident does not pay his taxes. In case of non-payment, the land becomes liable and is treated the same as non-resident land and sold in the same manner as non-resident land. The procedure was fully considered and discussed in *Newman v. Supervisors*.⁵⁷ It was pointed out that the Revised Statutes and subsequent enactments in providing ways for assessing, levying and collecting taxes upon lands, classified lands into two divisions: One, those of residents and the other, those of non-residents. The assessment under consideration was placed in the first class as the owner of the lands was a resident. The collector failed to find goods and chattels of the owner and failed to collect the taxes and made a return of that fact to the county treasurer. Thereupon the owner ceased to be liable and the lands ceased to be liable as those of a resident. After that, all attempts to collect the taxes must be made against the lands as those of a non-resident. For that purpose, the assessors no longer had power or jurisdiction. The only officer who had power and jurisdiction to initiate new proceedings was the supervisor. The lands were taken out of the resident class and placed in the non-resident class and subsequent proceedings could only be carried on by the supervisor, county treasurer and Comptroller. The lands could not be assessed again as resident lands. They must be sold in the same manner as if they were non-resident lands.

4. *Re-levy by Comptroller Against an Occupant, of a Tax Erroneously Assessed as Non-resident.*

"There was not even the form or appearance of an assessment against the occupants, and that against the owner was

57. 45 N. Y. 676.

illegal and invalid. Under such circumstances a re-levy of the tax by the Comptroller necessarily involved a new assessment by him, and against the occupants who as yet had never been assessed at all. If he could make such assessment, which would necessarily be the first or original one against them, he certainly must act under some law which gives them notice and a right to be heard. * * * for the question always is, not what was done, but what might be done under the law.”⁵⁸

5. *When No Legal Right Exists to Assess the Land.*

This is one of the defects mentioned in Section 132 of the Tax Law and is jurisdictional. It was especially mentioned in the section, apparently as distinguished from the general classification therein. The proceedings might be regular in form but have no effect because carried on by one having no authority. There must be a legal right to make the assessment. As was said in *Nehasane Park Asso. v. Lloyd*,⁵⁹ the statute conferred no authority to impose any assessment upon the lands in question, and hence the assessment and all the proceedings for the sale resulting in the deed were void.

So, in *Saranac L. & T. Co. v. Roberts*,⁶⁰ the trustees assessed lands not within their district, and it was held that the “school tax had been laid without jurisdiction in the taxing authorities.”⁶¹

In *A. L. C. v. Keyes*,⁶² it was contended that the assessment-roll and the valuation was made by a person or persons other than the assessors.

The lands must not only be in the district in which the assessing officers have jurisdiction, but the assessment and valuation must be made by those having authority so to do and not by one delegated by them or by one without any delegation of authority. The act must be that of the officer and not of any other person.⁶³

58. *People v. Wemple*, 117 N. Y. 77.

59. 167 N. Y. 431.

60. 195 N. Y. 303.

61. See also *S. L. & T. Co. v. Roberts*, 208 N. Y. 298.

62. 122 A. D. 178; 106 N. Y. Supp. 963.

63. See *People v. Parker*, 117 N. Y. 86.

6. *Where There is a Failure to Assess Known Lots by Numbers or Subdivisions.*

In *May v. Traphagen*,⁶⁴ two lots were assessed as one; a value was not placed on each lot separately and the court held:

"We think that there was a fundamental defect in the proceedings for assessment and taxation. * * * The only conclusion to be reached is that there was a failure to impose any tax for the year 1883, and, therefore, the proceedings for the sale of the land were void."⁶⁵

In *People v. Baker*,⁶⁶ decided as recently as 1917, there was involved a great lot which had been divided into sub-lots and known as such for thirty-four years. The court stated that it was "the duty of the assessors to designate sub-lots 1 and 2 as lots and subdivisions of great lot 33" and that "the failure to properly assess these lands * * * prevented the transfer of any title or interest therein."

The failure of the assessors to certify that a tract was not subdivided has been held to be an irregularity only.⁶⁷

There may be a question as to whether a subdivision had been made. This would be a question of fact. Such a question arose in the case cited of *Cone v. Lauer*.⁶⁸

It is of particular importance that the description be sufficient to identify the property. This rule was also expressed in *Cone v. Lauer*.⁶⁹

7. *Where There is a Failure to Verify Tax Rolls.*

In *People v. Inman*,⁷⁰ the court was discussing proceedings so fatally defective that no title passes, and stated that "the same

64. 139 N. Y. 478.

65. See also *French v. Whittlesey*, 30 N. Y. Supp. 363.

66. 180 A. D. 275; 167 N. Y. Supp. 591.

67. *Jackson v. Rowe*, 106 A. D. 65; 94 N. Y. Supp. 568; af. 191 N. Y. 512. *Cone v. Lauer*, 131 A. D. 193; 115 N. Y. Supp. 644.

S. L. & T. Co. v. Roberts, 208 N. Y. 288.

68. 131 A. D. 193; 115 N. Y. Supp. 644.

69. 131 A. D. 193; 115 N. Y. Supp. 644.

70. 197 N. Y. 200, 9.

principle obtains as to the failure of the assessors to verify the tax rolls."

A verification before the time prescribed by law was held in *People v. Turner*,⁷¹ to be an irregularity only.

8. *Where All Assessors Do Not Act.*

An assessment by two or three assessors without notice to the third has been held to be unlawful and to vitiate the whole assessment.⁷²

9. *Where There is a Double Assessment One of Which Has Been Paid.*

See Section 102, Tax Law.

10. *Where There is an Attempt to Re-assess Without Notice.*

If an assessment has been adjudged illegal, there cannot be a re-assessment as there is nothing to act upon. A new assessment must be made.⁷³

The foregoing have been classified as defects within the provisions of Section 132 of the Tax Law on the theory that the section applied. This is for the reason that it is not found that the court has held to the contrary. It might be that if the question is squarely presented, the court would hold that some of the defects mentioned are not defects in the proceedings on the ground that there is no assessment in fact and that instead of a defective proceeding, there is no proceeding — consequently, no defect.

71. 145 N. Y. 451.

72. *People v. Parker*, 117 N. Y. 86.

See also *People v. Supervisors*, 11 N. Y. 563.

73. *Matter of Douglas v. Bd. of Supervisors*, 172 N. Y. 309.

B. FAILURE TO GIVE TAXPAYER NOTICE OR OPPORTUNITY TO
BE HEARD.

1. *About Original Tax.*

Overing v. Foote⁷⁴ was reported in 1875. Under the act considered by the court, the assessments were to be made during the month of July. On completion, notice thereof was to be given. After the giving of such notice, the assessors added other names to the roll. It was held that after notice had been given that the roll was complete, it was deemed to be complete, and that no names could be added without repeating the notice; that if names were added by the assessors "their acts were simply void." There must be a period when the assessment-roll must be regarded as complete and the duties of assessors in that respect ended.

Matter of Douglas v. Bd. of Supervisors,⁷⁵ held:

"There must be notice in some form or at least adequate means of knowledge equivalent to notice, such as a general statute presumed to be known to all, or a proper advertisement fixing the time and place for a hearing, before a valid tax can be finally imposed either *in personam* or *in rem*. The taxpayer has an absolute right to be heard before some officer or tribunal authorized to correct errors, and unless this right is afforded any attempt at taxation is neither binding upon him personally nor a charge upon his property."

Matter of Common Council of Amsterdam⁷⁶ held:

"The validity of the statute depends not on the time or mode of notice directed, but upon the fact that it directed it and furnishes an effective opportunity to be heard."

People v. Feitner⁷⁷ held:

"A taxing act, which requires a valuation of property as part of the procedure, is unconstitutional unless it provides a grievance day, or an adequate opportunity to be heard and

74. 65 N. Y. 263, 76.

75. 172 N. Y. 309, 315.

76. 126 N. Y. 158, 165.

77. 191 N. Y. 88, 100.

any tax levied under such a statute is void. If, however, a grievance day is provided but notice thereof is not given, while the statute is valid, the tax is voidable.”⁷⁸

But see *Saranac L. & T. Co. v. Roberts*:⁷⁹

“What had been said in the opinions in the *Turner* cases, as to the remedy of an application to the Comptroller, was withdrawn in *People ex rel. Willards v. Roberts* (151 N. Y. 540).”

Matter of Young,⁸⁰ following the *Turner* cases, held that failure of the assessors to meet on grievance day constituted an irregularity; that it was not a jurisdictional defect; that the omission did not render the assessment void but merely voidable.

This decision indicates that a tax deed may be *voidable* on account of an irregularity or *void* for a jurisdictional defect.⁸¹

2. *Of the Re-levying of a Tax.*

*Matter of Douglas v. Bd. of Supervisors*⁸² held:

“It expressly appears, however, that no notice of the proposed re-assessment was given to the appellant and that no opportunity was given him to be heard in relation thereto. * * * The re-assessment, therefore, was made without notice either actual or constructive.”

“The assessment and collection of a tax without adequate notice to the owner is taking property without due process of law.”

“Our conclusion is that the re-assessment in question by the board of supervisors was, under the circumstances, a new

78. See also *Hagner v. Hall*, 10 A. D. 581; 42 N. Y. Supp. 63; *af. 159 N. Y. 552*, on opinion below.

People v. Hegeman, 220 N. Y. 118, *obiter*.

People v. Turner, 117 N. Y. 227.

People v. Turner, 145 N. Y. 451.

79. 195 N. Y. 303, at page 316.

80. 26 Misc. 186; 56 N. Y. Supp. 861.

81. See also *Jewell v. VanSteenburgh*, 58 N. Y. 85, on this point.

82. 172 N. Y. 309.

and original assessment by that board, and that the same could not be made without notice to the landowner.”

3. *By School Trustees Assessing Lands Not on the Assessment-Roll, or Increasing the Valuation.*

*Jewell v. VanSteenburgh*⁸³ involved an assessment by school trustees who increased the valuation of the plaintiff's property from the valuation fixed by the town assessors and shown upon the town assessment-roll. The question arose as to whether such action constituted a jurisdictional defect. The court stated the general rule that when an officer has jurisdiction and errs in the exercise of it his acts are not void but voidable. The difficulty is in determining when jurisdiction has been acquired.

“Trustees of school districts and assessors, in making assessments, must acquire jurisdiction of the person and subject matter, or their proceedings are void. In performing duties of a judicial nature they are protected, but giving the notice to taxpayers is a ministerial and not a judicial act. They have no discretion or judgment to exercise. The mandate is positive, and must be obeyed. * * * It is in the nature of process to bring them into court, and it must precede the power of the trustees to act upon the subject. In the first instance, the assessors may exercise their own judgment as to who are taxable persons; and the kind and value of the property to be taxed; but this is preliminary to the final adjudication. Before that can be made, the persons proposed to be taxed are to have a hearing, and it cannot be made until an opportunity for such hearing is afforded. As well might a justice of the peace render judgment against a party, without the service of process.

“In the case of school trustees, so far as they make an original assessment or change an assessment, they must give the prescribed notice, and if they fail to do it they have no legal right and no jurisdiction to make it.”

*Applied in Saranac L. & T. Co. v. Roberts.*⁸⁴

83. 58 N. Y. 65.

84. 125 A. D. 333; 109 N. Y. Supp. 547; af. 195 N. Y. 303; 208 N. Y. 288.

It has already been pointed out that failure to give a taxpayer an opportunity to be heard is a jurisdictional defect or a defect in the proceedings affecting the jurisdiction, thus falling within the provisions of Section 132 of the Tax Law. The defect would make the tax deed void and not merely "voidable" as stated in *People v. Feitner*.⁸⁵

C. FAILURE OF BOARD OF SUPERVISORS TO EXTEND TAX.

In *People v. Hagadorn*,⁸⁶ it appeared that the supervisor for a town, after the final adjournment of the board of supervisors, and after the supervisors had signed and attached the collector's warrant to the uncompleted assessment-roll, carried the same home, and in the absence of the board of supervisors, computed the amount of the tax for each of the years in question, upon the several pieces of land therein described, and entered it in the roll, and, as thus filled out, handed the roll and warrant to the collector for collection.

It also appeared that the board of supervisors before adjourning had, in each year, fixed the ratio of tax upon the aggregate amount of valuation, and had authorized the supervisor of the town to compute and enter the amount of the tax in the roll.

Held, that

"Whatever clerical duty may properly be devolved upon third persons, it is clear that it can be such only as is to be performed in the presence of the board and under its supervision, and that the duty of passing upon the question of a corrected assessment-roll and certifying to its accuracy, and completeness as a perfected roll, is a judicial duty which cannot be delegated."

"We are, therefore, of the opinion that the rolls for the several years * * * and the warrants attached thereto were fatally defective, and imposed no liability upon the persons taxed."

"It is also equally clear that a return of the non-payment

85. 191 N. Y. 88, 100.

86. 104 N. Y. 516.

of taxes, so levied, conferred no authority upon the Comptroller to sell the land thus taxed." ⁸⁷

The Statute of Limitations was not pleaded in *People v. Inman*.⁸⁸

It is to be noted that in the Hagadorn case ⁸⁹ the court specifically stated that the acts complained of "constituted a fatal irregularity in the proceedings to levy the taxes in question." It was evidently a "defect in the proceedings" under Section 132 of the Tax Law. Although the court spoke of the defect as an "irregularity," it was undoubtedly more than that. As later stated in the opinion, the tax rolls and warrants were "fatally defective." It was also stated that a sale of land for taxes which are void, "is an excess of jurisdiction in the officer making the sale and renders his proceedings void."

D. PAYMENT OF TAX FOR WHICH SALE WAS MADE.*

Section 132 of the Tax Law is made applicable by specific words to a case where taxes have been paid. If it is operative, it places one who has actually paid his taxes in a worse position than one who has not paid although has endeavored to pay as in *Wallace v. McEchron*.⁹⁰ It might be questionable whether Section 132 even as a Statute of Limitations would apply in a case where lands have been sold for the non-payment of taxes which have in fact been paid.

One of the earliest cases involving a sale of lands for non-payment of taxes, when the taxes were in fact paid, is *Jackson v.*

⁸⁷. See also *Nehasane Park Assn. v. Lloyd*, 167 N. Y. 431.

⁸⁸. 197 N. Y. 200.

See also *Adirondack League Club v. Keyes*, 122 A. D. 178; 106 N. Y. Supp. 963.

S. C., 140 A. D. 882; af. 205 N. Y. 604.

⁸⁹. 104 N. Y. 516.

* See also *NOTE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 33, p. 382. B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8425.

⁹⁰. 176 N. Y. 424.

Morse.⁹¹ The Comptroller sold for the alleged non-payment of taxes in the years 1811 and 1812. The Comptroller's deed was dated in 1817. The taxes had in fact been paid. The court in passing upon the effect of the Comptroller's deed held as follows:

"The statute declares that the conveyance shall vest an absolute estate in fee simple in the purchaser; which it does, if the tax has not been paid; but if it has been paid, then no estate passes by the sale, for the statute intended to divest the title of the former owner, for non-payment of the tax, and for that only; and it must be so construed. The title acquired by the purchaser is contingent, so far as it may be affected by establishing the fact that the tax had been paid before the sale was made. This is an implied condition annexed to every grant of this kind, founded on a sound construction of the law, with which the purchaser is presumed to be acquainted; he purchases subject to this risk."

Joslyn v. Rockwell⁹² was decided after the enactment of Chapter 448 of the Laws of 1885. The court stated that it had never been held that a statute making a tax deed conclusive evidence of every fact which ought to exist in order to create a good title under such deed, would be valid as against the original owner who had in fact paid his taxes. The question of whether the record of the tax deed would constitute notice to the owner was considered but the court did not decide same.

Section 132 of the Tax Law has existed in its present form, substantially, since 1896, since which time, *Levinson v. Myers* was tried and reported.⁹³ The Comptroller had sold for unpaid taxes which had in fact been paid; the purchaser under the tax deed entered into possession and the owner brought an action in ejectment, claiming the tax deed void because the taxes had been paid. The action was brought within the five year period stated in Section 132 of the Tax Law. Held, that the Comptroller was without jurisdiction to sell.⁹⁴

91. 18 Johns. Rep. 441.

92. 128 N. Y. 334.

93. 100 Misc. 379; 166 N. Y. Supp. 703.

94. See also *People v. Hegeman*, 220 N. Y. 118, 21, *obiter*.

CHAPTER XXXV.

Statutes of Limitations.*

First. Rule of Evidence.

Second. Contra.

Third. Rights of State.

The effect of Section 132 of the Tax Law as a statute of limitations with respect to irregularities was discussed under the subject head of "Irregularities." Its effect with respect to jurisdictional defects was referred to. The most important question is the use which might be made of the section, and by whom. If its use is limited to a defense, a plaintiff may never be able to avail himself of it. In any event, the statute is for the benefit of the holder of a tax deed and not one who as a plaintiff is attacking a tax deed.

First. Rule of Evidence.†

It has been urged that the statute is "a rule of evidence" and that it operates both as to the plaintiff and the defendant. In *People v. Payne*,¹ plaintiffs claimed under a tax deed and sought to eject defendant in possession. It appeared that the tax deed was invalid. On a motion to vacate a judgment, Judge Van Kirk writing the opinion (Special Term), held that defendant could not be heard to say that the tax deed was invalid—that the statute operated against the one in possession and in favor of the holder of the tax deed—that it operated to aid plaintiff in his attack. He stated:

"It is a rule of evidence, which sometimes operates as a Statute of Limitations and sometimes as a curative statute.

* See also Wood on Limitations, 4th Ed.

† See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 24, p. 265-1. 181 A. D. §99.

182 A. D. 904.

It provides that after a certain time and in certain contingencies, the Comptroller's deed is conclusive evidence of certain facts (*Wallace v. McEchron, supra*, 424, 427); and, if conclusive, it is conclusive as to both parties to an action. If this defendant desired to avoid the effect of the Comptroller's deed and its record, and be permitted to question plaintiff's title because of defects in the proceedings resulting in the tax sale, he must bring his action within the time limited."

It was contended by the defendant that the statute was not an aid to one having a void tax deed and not in possession; that it could not be used as an instrument of attack; that it could only be pleaded as a defense by one holding a tax deed when it was sought by a plaintiff claiming ownership, to have the tax deed declared void as a cloud on title, or to eject one in possession under a tax deed. To summarize, defendant contended that Statutes of Limitations "are shields for the defense of the possessor, not weapons for his eviction," citing *Marsh v. Nehasane Park Asso.*²

Second. Contra.

With reference to "a rule of evidence," the following was stated in *Joslyn v. Pulver*:³

"If by any refinement of statutory limitations or rules of evidence, the State can ultimately confiscate the property of an individual in a case where it never had jurisdiction to proceed at all, the constitutional guaranty of due process of law would yield to legislative despotism. As said in *Howard v. Moot* (64 N. Y., 268), and repeated in *People v. Turner* (117 id., 235): 'A law that should make evidence conclusive, which was not so necessarily in and of itself, and thus conclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property or a destruction of vested rights.'"⁴

2. 25 A. D. 34, 38; 49 N. Y. Supp. 384.

3. 59 Hun, 129, 34; 13 N. Y. Supp. 311; af. 128 N. Y. 334.

4. See also *Turner v. Boyce*, 11 Misc. 502, 7; 33 N. Y. Supp. 433.

In 1920 Judge Salisbury at Special Term wrote the opinion in *People v. Faxon*.⁵ He took a position opposite to that taken by Judge Van Kirk,⁶ and held that Section 132 of the Tax Law applied only to an action or proceeding initiated by one claiming title against another who had a tax deed; that if an action were brought by the holder of a tax deed against one claiming title, the one so claiming title was not limited by the act from setting up a defect as a defense. To quote: "Statutes of Limitations operate to bar a remedy. The defendants are not making an attack. They are defending."

In this case the People held the tax deed as in the *Payne* case⁷ and were also the plaintiffs. In both instances the defendant was in actual possession — at least of part.

The reasoning of Judge Salisbury seems to apply to one in constructive possession only as against one who attacks under a tax deed.

As was said in *People ex rel., McGuinness v. Lewis*:⁸

"An owner in possession, actual or constructive, may not be required to take notice of the running of the Statute of Limitations."⁹

There is a conflict in authorities which was referred to in *Meigs v. Roberts*.¹⁰

Section 132 of the Tax Law does not provide that an action must be brought for the cancellation of a tax deed within a specified time after the record thereof or that the statute shall start running on the record thereof; it provides that the action must

5. 111 Misc. 699; 182 N. Y. Supp. 242.

6. See NOTE 1 this chapter.

7. See NOTE 1 this chapter.

8. 127 A. D. 107, 10; 111 N. Y. Supp. 398.

9. See also *Clark v. Kirkland*, 133 A. D. 826, 35; 118 N. Y. Supp. 315; *af. 202 N. Y. 573*.

10. 162 N. Y. 371, 9.

See also *Bryan v. McGurk*, 200 N. Y. 332.

Peterson v. Martino, 210 N. Y. 412, 20.

Doud v. H. H. C., 178 A. D. 748; 165 N. Y. Supp. 908.

be brought within five years from the expiration of the period allowed for redemption which is six years from the last day of sale. Yet, the section applies only to recorded deeds. So if the deed is not recorded and six years has elapsed since the sale, the section does not apply, *i. e.*, the tax deed does not become conclusive against the owner. If the deed was executed prior to 1895 but recorded after 1895, the section does not apply at this time for the reason that the section provides that in case of all sales held prior to the year 1895, action shall be brought before June 15, 1897. Although the recording is essential to make the statute operative,¹¹ time does not run from the date of recording. Assume that the section applies to a sale ending December 15, 1915, and a deed recorded December 10, 1919. An action must be brought before December 15, 1921 — two years and five days after the recording of the deed or the owner would be barred from bringing an action. Under this state of facts the action could be maintained if started on December 14, 1921, because the six year period had not elapsed although the deed had been recorded for only two years.

There appears to be two periods — one with respect to the record of the deed, and the other with respect to the last day of sale.

There must be something done by the holder of a void tax deed, with respect to the premises, in order to start the statute running — something which will call upon the owner to assert his rights or invoke his remedies. Entry and occupation by the tax deed holder would be notice of his claim and start the statute running, although possession is not mentioned in this section. It has never been held that the mere record of a void tax deed is sufficient notice although it was intimated in *Peterson v. Martino*¹³ that it might be. A similar statement is found in *Bryan v. McGurk*.¹⁴

11. See *Olmstead v. Roberts*, 69 Misc. 641, 2; 127 N. Y. Supp. 854, which holds that a tax deed "not being recorded, there is no presumption of regularity as to the proceedings leading up to the sale and the execution of the deed under the statutes."¹²

12. See also *Hershey v. Robson*, 121 N. Y. Supp. 167.

Bryan v. McGurk, 200 N. Y. 332, 9.

13. 210 N. Y. 412.

14. 200 N. Y. 332.

The effect of recording a tax deed was directly considered in *Dodd v. Boenig*.¹⁵ It was pointed out that a recorded deed is a constructive notice to subsequent purchasers from the one giving the deed but that it is no notice to one who does not claim through a party to the deed. The following was quoted from *Tarbell v. West*:¹⁶

"The recording acts, however, do not declare what effect shall be given to the recording of conveyances, upon the point of notice. They declare that unless recorded, they shall be void as against subsequent purchasers in good faith, and for value, whose conveyances shall be first recorded. But the courts, by construction, make the record of a conveyance, notice to the subsequent purchasers; but this doctrine is subject to the limitation, that it is notice only, to those claiming under the same grantor, or through one who is the common source of title."

Third. Rights of State.*

The State holding a tax deed is in a unique position, as distinguished from an individual. An individual is not obliged to buy, but if he does he can easily and practicably reduce his claim of title under his tax deed to actual possession. The State has a lien which may be valid or invalid without any means of ascertainment. Its validity may depend on facts not appearing in the record. If no one bids at the tax sale, the State is obliged to bid in and purchase under the requirements of Sections 122 and 123 of the Tax Law. Thereupon the lands are placed upon the State land list kept by the Comptroller and the State is obliged to pay subsequent taxes.¹⁷ The question is of most importance as regards lands in the Adirondack and Catskill Parks. Through the Conservation Commission the State spends large sums in controlling and caring for these parks and in maintaining fire stations. Signs are erected on the lands at various points and

15. 114 Misc. 144.

16. 86 N. Y. 288.

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 3413.

17. See Section 22 of the Tax Law.

trails maintained as well as camping places. Thousands of trees are planted on divers parcels. In addition, a large number of maps showing distinctly the lands claimed by the State as distinguished from adjoining lands, are distributed broadcast and posted in numerous public offices and places. The public as well as individuals claiming adversely, are kept well informed as to the claims of the State and as to the particular lands claimed by the State, although the State is not in a position to reduce its claim of title under its tax deed to actual possession in the same way as an individual. The State cannot build houses or other buildings or carry on lumbering operations like an individual.

CHAPTER XXXVI.

Statutes of Repose.*

The inquiry presents itself as to how a Statute of Limitations can have the effect of transferring a title in any event. It has been held that a valid tax deed may give an absolute title but that a void tax deed gives no title. Time alone will not make a void tax deed valid or have the effect of transferring title. If there is possession under the void tax deed a new element is added. There may be a short statute of adverse possession and probably Section 132 of the Tax Law may have that effect under the decision in *Doud v. H. H. C.*¹

As was said in *Baker v. Oakwood*:²

“The doctrine that a Statute of Limitations merely extinguishes the remedy has been frequently applied to contract obligations. As thus applied, the principle cannot be disputed. Time may bar an action upon the promise or contract, but it does not pay the debt. That remains as a moral obligation at least, and is a good consideration for a new promise. Adverse possession of tangible property implies not only the lapse of time, but the occupation and enjoyment by the possessor, and the acquiescence of the true owner in a hostile claim of title. The idea that the title to property can survive the loss of every remedy known to the law for reducing it to possession and enjoyment would seem to have but small support in logic or reason. Enactments which are appropriately termed statutes of *repose* when applied to the adverse possession of land, have, as it seems to us, a broader and deeper effect than simply to destroy the remedy of the true owner for its recovery.”

* See also Wood on Limitations, 4th Ed.

1. 178 A. D. 748; 165 N. Y. Supp. 908.

2. 123 N. Y. 16, 26.

Judge O'Brien who wrote this opinion quoted from other opinions as follows:

"The counsel for the appellant insists that an adverse possession, although for the length of time required by statute to bar the owner, is available only as a defense to a suit brought by such owner for the recovery of the land. In this the counsel is in error. When the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all other for the time prescribed by statute, such possession establishes title."

Note that the possession must be for the length of time required by "the statute" (p. 28). The statute here under consideration is silent as to possession.

Assume that the holder of a void tax deed records same promptly but does not take possession until a short time before the expiration of the six year period provided by Section 132 of the Tax Law. Such a state of facts might make *Doud v. H. H. Co.*³ inapplicable.

"Statutes of Limitation are statutes of repose," as stated in *Edwards v. Kearzey*.⁴ "The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified." If the period limited be unreasonably short and designed to defeat the remedy, the statute may be void. Otherwise, it would be operative.

As was said by Judge Kellogg in *Turner v. Boyce*; ⁵ "A Statute of Limitations * * * is a time limit to the enforcement of a latent or dormant right; if not enforced within the time fixed it is counted as abandoned."

3. 178 A. D. 748; 165 N. Y. Supp. 908.

4. 96 U. S. 595, 603.

5. 11 Misc. 502, 9; 33 N. Y. Supp. 433.

CHAPTER XXXVII.

Laches.*

There is another principle involved, namely, laches. By possession of tangible property one may acquire title to it superior in law to that of another, who may be able to prove an antecedent paramount title. This superior or antecedent title may be lost by the laches of the person holding it, *i. e.*, by failing to resume possession to which he is entitled or by failing to assert a right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession without question of his right.¹

Where an owner has paid the tax for the alleged non-payment of which a sale was made and has been ready and willing to pay subsequent taxes if the assessment and levy had been in such form as to enable him to do so, he should not be charged with laches. If the lands are later properly assessed to him or properly assessed as non-resident, there is no reason why he should not pay subsequent taxes—he should not be permitted to take advantage of his neglect. But if the lands should be later assessed to another or not assessed at all, he might not be called upon to pay subsequent taxes and no duty might rest upon him to try to pay.

Where an owner has not paid the tax for the non-payment of which a sale was made, he is not entitled to the same consideration. He is surely not entitled to much if any consideration, if the lands are subsequently assessed as non-resident and properly so, and if he fails to pay subsequent taxes. An owner owes a duty to pay his taxes or the taxes on lands owned or claimed by

* See also *NORE*, N. Y. Ct. of Ap. Rep. Bender Annotated Ed., Bk. 26, p. 583.

1. *Campbell v. Holt*, 115 U. S. 620, 2.

him and he should not be permitted to profit through his failure to perform his duty. If some other person or the State or a municipality should perform his duty and carry the burden which he should carry and if this condition should continue for a period of years, equity demands that such other person or the State or municipality which has assumed the burden should not lose.

A distinction might well be made between an individual purchaser and the State or a municipality. If an individual purchases, he can enter and enjoy the land purchased and reap enough benefits so that he should pay subsequent taxes. When the State or a municipality purchases it does so from necessity and it may not — in fact, cannot in most cases — reap any practical benefits to offset the payment of subsequent taxes. In general, the State or municipality may or must pay subsequent taxes year after year. Sometimes as in the case of State lands assessed under Section 22 of the Tax Law, the State has paid taxes for a long period of years — twenty, thirty, forty years, or even longer. If the owner who did not pay the tax for which the sale was made and who has not paid any subsequent taxes, might now treat the sale and tax deed void for a jurisdictional defect, a great injustice would result — one which equity might not permit.²

Laches might be charged against an owner who has not paid a tax if he remains silent while the one holding the tax deed takes actual possession of the lands described therein. By this is not meant a twenty years adverse possession, but such an entry and occupation as to charge the owner with notice of an adverse claim of title. It is to be assumed that the entry was made under a claim of right and that the one entering believed his entry to be lawful.

The owner is presumed to know that he did not pay his tax (if he did not in fact pay it) and to know the penalty for non-payment, viz, that the land will be sold. He is charged with notice that entry by another might be under a claim of title by virtue of a tax deed. The situation is different from one where the

2. *Miner v. Beekman*, 50 N. Y. 337.

People ex rel. Townshend v. Cady, 50 N. Y. Super. Ct. 399.

owner has continuously paid his taxes and has no reason to suspect that a sale has been made and a deed issued.

The nature and extent of the occupancy would be an element, *i. e.*, whether it was sufficient to create notice and to charge the owner with laches by remaining silent.

CHAPTER XXXVIII.

Defective Deeds.

- First. Generally.
- Second. Indefinite and Uncertain Descriptions.
- Third. Description Reciting Acres Only.
- Fourth. Definite Descriptions.
- Fifth. Acres Definitely Located.
- Sixth. Intention Not Controlling.

First. Generally.

One of the most common defects to be found is an indefinite or uncertain description of the property assessed, advertised, sold or conveyed. Sometimes the defect exists in the assessment only, followed by a corrected description which may or may not be legally made. It is the purpose to consider primarily defects in description in tax deeds. The descriptions should be in such form that the property can be identified and located. Greater exactness is required in a tax deed than in a deed from an individual as the question of intention does not apply where an official gives a deed as where a deed is given by an individual.

In many cases the Comptroller has sold a particular number of acres in a lot, being a less number of acres than the total number of acres contained in the lot, without locating the land intended to be conveyed or specifying the shape. Such a description cannot be held to be sufficient to pass title.

Second. Indefinite and Uncertain Descriptions.*

The early Revised Statutes provided that if the quantity of land to be assessed be a full lot, it is sufficient to designate the lot by its number but that if a part of the lot is assessed, the part must

* See also NOTE, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 29, p. 847. B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, pp. 8410 to 8413, inclusive.

be designated by boundaries or in some other way by which it may be known. These provisions were incorporated in the later acts and at the present time may be found in Section 21 of the Tax Law. The descriptions "shall be sufficient to identify each separately assessed parcel or portion of real estate."

Where a wrong number of a lot was used, the defect was held to be fatal in the early case of *Dike v. Lewis*.¹

*Tallman v. White*² involved a description of a part of a block with a given number "in the village of Lodi." It appeared that such a village did not exist but that "Lodi" was the name of a tract of land in the then village of Syracuse; that the lands in question were somewhat distant from the tract. The tax deed was held void for the reason that the misdescription would probably mislead and that the land owner might be misled and deceived by such a mistake as was made in this case.

An assessment which does not describe the lands assessed or state the amount thereof was held to be defective under Section 21 of the Tax Law and void, as well as all subsequent steps leading to a sale. The form of assessment in the particular case read: "Land — Huguenot St." ³

An assessment which read: "Lot 7, Sub. 2, 15 acres, C. R. Jones lot" was held not to describe any property so that it could be indentedified.⁴

An assessment, "house and lot, 33 Woodbury St." was held insufficient.⁵

Where in the description in an assessment roll, advertisement of sale, notice to redeem and conveyance of lands sold for taxes,

1. 2 Barb. 344.

2. 2 N. Y. 66.

3. *Lawton v. City of New Rochelle*, 114 A. D. 883; 100 N. Y. Supp. 284.

4. *Shea v. Campbell*, 71 Misc. 222, 30; 128 N. Y. Supp. 508.

5. *McInnis v. City of New Rochelle*, 99 Misc. 388; 163 N. Y. Supp. 1003.

which were described as a part of a farm, but two boundary lines were given, which were street lines and did not actually enclose any land, and it was impossible to ascertain from the description the form or shape of the lot, *held* that the description was insufficient, and that the deed was void for uncertainty.⁶

"The boundaries of the lands attempted to be described are vague and indefinite on the southern and western sides of the lands assessed. * * * This is inadequate. * * * Such an insufficient description is not helped out by recording under Tax Law, Sections 131, 132."⁷

If a "tax deed does not sufficiently describe any tract of land, the sale represented by such tax deed is obviously invalid and conveys no rights whatever. This would seem to be a situation not covered by Section 132, but one which may be attacked at any time under Section 140, which specifies no period of limitation within which * * * cancellation may be made."⁸

In *Peterson v. Martino*,⁹ a description of land in an assessment roll and in a tax deed was held to be so vague and indefinite that the property could not be identified. The court stated that "the record of such a deed gave * * * no warning," that the land of plaintiff had been sold. "It might as well have been a deed without any description whatever. The deed was void for uncertainty * * * and no record could increase its efficacy."

It is the duty of the Comptroller to advertise and sell land by the descriptions returned to him. If a description is defective he should not sell but should reject as provided by Section 101 of the Tax Law. He cannot supply a defect or correct or

6. *Zink v. McManus*, 121 N. Y. 259.

See also *Matter of N. Y. C. & H. R. R. Co.*, 90 N. Y. 342.

Fulton v. Krull, 200 N. Y. 105.

7. *Rhinehart v. O'Connor*, 173 A. D. 942; 158 N. Y. Supp. 337.

8. *People ex rel. Staples v. Sohmer*, 150 A. D. 3, 12; 134 N. Y. Supp. 543; *af.* 206 N. Y. 39.

9. 210 N. Y. 412.

make a new description where a sufficient description did not exist in the assessment.¹⁰

Third. Descriptions Reciting Acres Only.

A conveyance of a certain number of acres without locating same and without describing the shape is fatal and the sale is void.

The case of *People v. Stillwell*¹¹ involved a plot of 163 acres. The assessment was of 127 acres. In discussing the assessment, Justice O'Brien, writing the opinion of the court, stated that the lands were not properly or sufficiently described. He further said:

"In case of a sale for taxes the land as described in the assessment roll could not be very well identified and the 127 acres separated from the whole tract. The only description of the land assessed is 'part lot thirty-five, 127 acres.' It would seem to be impossible from this description to identify and describe in a conveyance the particular 127 acres which the relator owns. The 163 acres are a part of lot number thirty-five in township number twelve, range eight, of the Holland Land Company's survey. That whole lot is said to contain above 500 acres of land. There is no identification of the particular 127 acres in question. It might refer to any lot thirty-five, and a conveyance by such a description upon a tax sale would be void for uncertainty. * * * The assessors should have given such a description of the land as to enable a purchaser upon a tax sale to locate it."

Where a tax deed described land as "twenty-five acres north side, fronting on highway" * * * "to be located and laid out, however, by and at the expense of the party of the second part," * * * "There is practically no description." The deed is void for uncertainty and no title passed under it.¹²

10. *Thompson v. Burhans*, 61 N. Y. 52.

McCoun v. Pierpont, 195 A. D. 726.

11. 190 N. Y. 284.

12. *Underhill v. Keirns*, 54 A. D. 214; 66 N. Y. Supp. 573; af. 170 N. Y. 587. See also *Shea v. Campbell*, 71 Misc. 222, 30; 128 N. Y. Supp. 508.

In *Nolan v. Phillippi*,¹³ a parcel of land in the town of West Seneca, Erie County was sold for unpaid taxes by the county treasurer. The land was assessed "William Connors, part of farm lot 192, township 10, range 7; eleven and one-quarter acres, in the town of West Seneca." * * * "the eleven and one-quarter acres are given no boundary lines. It does not appear from what part or portion of farm lot 192 this eleven and one-quarter acres is to be taken. No one with such a description would be able to locate or identify any particular parcel of land as the parcel intended to be described or sold."

It might be urged that if a certain number of acres should be sold, the purchaser would be a co-tenant with the former owner; that if one-half of the acres in a lot should be bid and sold, the purchaser and the former owner would each own an undivided one-half of the lot. But a tenancy in common cannot be created in that way. There is no authority in the Tax Law for so doing. A part of a lot or parcel may be sold but not an undivided interest therein, unless an undivided interest is so assessed and offered for sale.

The rule is not the same as where lands are owned by tenants in common. One tenant in common may sell and convey his undivided interest which he may own in and to an entire lot or parcel, or a fractional part of such interest, but he cannot sell and convey a specified part of such lot or parcel in and to which he owns an undivided interest, or a certain number of acres thereof, or all or part of his interest in and to less than the whole lot or parcel.¹⁴

In the early case of *Peck v. Mallams*,¹⁵ a parcel of "about 100 acres" out of a tract of 400 acres and another parcel of "200

13. 99 Misc. 384; 163 N. Y. Supp. 730.

14. Vol. 7, *Ruling Case Law*, Sec. 76, p. 881.

Pellow v. Artie Iron Co., 164 Mich. 87; 47 L. R. A. (N. S.) 573.

Barnes v. Lynch, 151 Mass. 510.

Crippen v. Morss, 49 N. Y. 63.

Palmer v. Palmer, 150 N. Y. 139.

City Club v. McGeer, 198 N. Y. 160.

15. 10 N. Y. 509.

acres" out of the same tract were sold and conveyed by a sheriff. The conveyances were held to be void for uncertainty.

Fourth. Definite Descriptions.

Following the foregoing decisions, certain descriptions might at first appear indefinite but have been found to be sufficient by the courts.

Such a description was "P. lot 54; town one; range three: acres, 150," which was before the court in *Colman v. Shattuck*.¹⁶ It was held that, as there was only one lot fifty-four in the town and range, the statute was complied with. The objection was made that the lot in question was a part of a tract and that there was a failure to designate the tract in which the land was situated. It appeared that the town was a part of a tract recognized in the public statutes of the State, which was divided into townships, ranges and lots with given numbers.

An assessment of a part of a lot in the same tract consisting of fifty acres but bounded by lands of adjoining owners was held sufficient in *H. I. Co. v. Schuster*.¹⁷

A description in a tax deed of one-fourth of an acre "being lot No. 66 in the village of Unionport" was held sufficient in *People v. Sohmer*.¹⁸ The objection was made that no particular map or tract was mentioned or referred to and for that reason the land was incapable of ascertainment; that the description failed to give proper notice to the owner of the premises sold. It appeared that there was a map of the village on file in the county clerk's office, upon which a lot was numbered "66" and that there was only one such map and lot number.

Fifth. Acres Definitely Located.

Under Section 122 of the Tax Law, the Comptroller is authorized to sell only "so much of each parcel * * * as will be

16. 62 N. Y. 348.

17. 66 Misc. 634, 50; 124 N. Y. Supp. 693; af. 151 A. D. 903; 134 N. Y. Supp. 1134.

18. 150 A. D. 8, 12; 134 N. Y. Supp. 543; af. 206 N. Y. 39.

sufficient to pay all the taxes thereon." The Comptroller therefore owes a duty to sell and convey less than the entire parcel advertised, in the event that anyone will bid a less area than that advertised. The practice has been to receive bids of a certain number of acres which are then or later located. Sometimes the acres are located in a corner or along one side or one end of a lot. This would depend somewhat upon the size and shape of the lot. The parcel sold should be in a compact form and so located that as little damage as possible should be done to the owner, and the part remaining to the owner should also be left in compact form and in a manner as favorable as possible to the owner.¹⁹ If a lot is oblong with a length two or three times the width, a large corner should not be sold, leaving a narrow strip, but instead one end should be sold and conveyed.

An early case involving the question under discussion is *Jackson v. Vickory*.²⁰ The question was as to the location of 200 acres to be taken from the southwest corner in a tract of 2,200 acres. It was held that the 200 acres should be located in the form of a square.

A more recent case is that of *Marsh v. Nehasane Park Assn.*²¹ The land was described as "250 acres in the northeast corner of the northeast quarter." It was held that "the corner is a base point from which two sides of the land * * * can extend an equal distance along the intersecting boundaries so as to include by parallel lines the 250 acres."

It is to be noted that many lots do not have square corners and that some are irregular in shape. The rule that the land should be located in the form of a square could not then apply. The rule is more or less arbitrary but has been followed in practice to a large extent.²²

Sixth. Intention not Controlling.

Where a description in a tax deed is indefinite or uncertain or where there is a recital of a certain number of acres, without

19. *Marsh v. N. P. A.*, 25 A. D. 34, 40; 49 N. Y. Supp. 384.

20. 1 Wend. 406.

21. 25 A. D. 34; 49 N. Y. Supp. 384.

22. See also *S. L. & T. Co. v. Roberts*, 208 N. Y. 288, 307, 8.

locating same and without a description of the shape of the parcel, the question is presented as to whether the intention of the officer executing the deed may be considered; also, whether extraneous evidence may be referred to in order to explain the uncertainty or to make definite that which is indefinite. There appears to be a well-defined distinction between deeds given by individuals and deeds given by officers, in particular those executing tax deeds. The Court of Appeals in *Peck v. Mallams*,²³ stated the rule with reference to a deed executed by an individual as follows:

“The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated. To this end parts of the description may be rejected, though upon the face of the deed they seem as material as the parts which are left. This only is requisite, that after subjecting the description to every modification which the actual condition of the premises may require, there must be left some substantial designation of the thing to be conveyed, so that the court can see, looking at the property in the condition in which it was at the time of the deed, that the description can be fitted to it and was intended by the parties to relate to it.”

In a later opinion in *Mott v. Mott*,²⁴ the following may be found:

“It depends upon the intent of the parties to be gathered from the description of the premises read in connection with the other parts of the deed, and by reference to the situation of the lands and the condition and relation of the parties to those and other lands in the vicinity, whether the grant extends to the center of the road or stream. This is the recognized rule of interpretation, and it is a question of interpretation and intent.”²⁵

23. 10 N. Y. 509, 32.

24. 68 N. Y. 246, 53.

25. See also *Benjamin v. Welch*, 73 Hun, 371, 4; 26 N. Y. Supp. 156.

The Court of Appeals very early pointed out a distinction where a deed was executed by the Comptroller and held that the question of intention was not to be considered. The following is taken from the opinion in *Tallman v. White*:²⁶

“In a deed between individuals, a part of the description of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him, intend to convey lands lying in one place, by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. A judicial decision which should sanction a title like the present, would open a door to innumerable frauds.”

Hanse v. Mead,²⁷ involved a parcel of land described in a tax deed as follows:

Sixty acres to be laid out at the expense of the grantee in a square form, as nearly as may be in the northwest corner of lot No. 15, of the Connecticut tract.

It appeared that lot No. 15 was oblong and nearly rectangular. It was about 20 chains by 51 chains. As a result, it was not possible to lay out 60 acres in a square form in one corner, nor was it possible to lay out 60 acres in a square form anywhere in the lot. Under the description, effect was given to the words “as nearly as may be.”

The particular importance of the decision is the rule laid down, viz.:

26. 2 N. Y. 66, 72.

27. 27 Hun, 162.

“The system of such a sale for taxes is to sell a certain quantity of the property. And, therefore, the number of acres mentioned must control; contrary to the usual rule in cases of conveyances by an owner.”

Judge Landon also stated in a dissenting opinion that “the purchaser is not entitled to invoke for his protection those liberal rules for the interpretation of deeds which obtain between private parties in aid of a grant.”

A more recent decision is to the effect that it will not do to sustain a description of land in a tax roll to consult other parts of the roll; that the only authority for describing property in a subsequent proceeding for a sale and in the tax deed is the description as assessed. Where a description was of a lot on a map, it was held that the court would not take judicial notice of private surveys. It was expressly held that:

“The question of the sufficiency of a description of property for the purposes of assessment or taxation is not to be determined by the *intention* of the assessors, but depends upon whether the *statutory requirements have been followed* and whether the land has been described with sufficient definiteness to enable the owner and all persons interested therein to know by an examination of the roll, or to ascertain by inquiring at the proper office, what lands are assessed, and to identify them as one particular tract or parcel of land answering to a description upon which a purchaser would be entitled to possession.”²⁸

Without criticising or referring to the foregoing decisions, the Court of Appeals in *S. L. & T. Co. v. Roberts*,²⁹ expressed some views which seem at variance with these decisions. The point was urged that the assessments were void for indefiniteness of description but it was held that:

28. *People ex rel. N. P. B. v. Metz*, 141 A. D. 600, 9; 126 N. Y. Supp. 986.

29. 208 N. Y. 288, 307, 8.

“ The intention plainly was to assess all of the unoccupied land in each quarter. * * * That is certain which is capable of being made certain. * * * A mistake in stating the number of acres * * * would not present a question of indefiniteness of description. The land was easily located.”

The conclusions, which the court stated may well be labeled conclusions of law, indicate that there was no uncertainty in the description of the land assessed.

The remarks with respect to acreage or quantity may be urged as not supporting some of the earlier decisions to wit:

“A description as to quantity is one of the least important matters even in a grant. Assessors cannot be expected to describe the land assessed by metes and bounds, courses and distances, and there would not be space enough in the roll even if they were able and had the time to do it. If a mistake was made in the quantity of land assessed the remedy of the owner was before the assessors or the board of supervisors.”

All of these decisions might be harmonized and result in a rule that if the description in the assessment-roll and tax deed is certain and definite and if there is no question as to the shape and boundaries, so that the land can be located on the ground, and if all of the land assessed is sold and conveyed, the tax deed might be valid, even though there is a mistake in the number of acres stated.

But where the Comptroller sells and conveys less land than that assessed, the quantity and location of same becomes important. The deed must specify the quantity in such terms that the purchaser may know how much and what particular land he is entitled to, and that the former owner may know how much and what particular land is left to him freed from the lien of the unpaid tax.

CHAPTER XXXIX.

Ineffectual Deeds.

First. When Purchase a Payment Only.

A. Abandonment.

Second. Purchase by Tenant in Common.

Third. Purchase by State.

Fourth. Sale to County.

A. Sale by County.

First. When Purchase a Payment Only.

A. ABANDONMENT.

The question always presents itself where the same lands are sold at successive tax sales, whether a later purchase of the lands, followed by a payment of the unpaid taxes for which said lands were later sold and the issuance of a certificate and deed to the later purchaser, vests a *title* in the purchaser or is in effect only a *payment* of the taxes. This depends somewhat on whether a later purchaser is the same person who has previously purchased the same lands or whether the later purchaser is acting for the person who previously purchased.

The following general rule may be found in 27 Am. & Eng. Enc. of Law, 2d Ed., page 954:

“A purchase at a tax sale by one upon whom rests the duty of paying the taxes operates merely as a payment of such taxes, leaving the title to stand as if the payment had been made before sale. But one who is under no duty, legal or moral, to pay the taxes for which property is sold, may purchase at the sale and acquire title under such purchase.”

The difficulty follows in the application of this rule and an interpretation of the word “duty.”

An *owner* of lands owes a *duty* to pay taxes assessed against

same. If he defaults in his payment of taxes and permits the lands to be sold and purchases at the sale, it is only a belated payment.

The text books and decisions generally are to the effect that if a person is in *possession* of land under color of title exercising acts of ownership and claiming title thereto, it is his duty to pay the taxes and he cannot purchase at a tax sale and so acquire title. It is to be noted that he may not in fact be the *real owner*. And the rule has been stated that if anyone *claims title* to land and buys same at a tax sale, he only removes the encumbrance resulting from the unpaid tax.

It has also been held that a person in *possession* without claim or color of title may buy at a tax sale and get title.

Assume that one has no other title than that derived from a tax sale and the issuance of a deed thereunder, recorded or unrecorded, has he by reason thereof a *duty* to pay taxes assessed previous or subsequent to the taxes for which the sale was held and under which he secured his tax deed? If the duty exists, then the appearance at a subsequent tax sale and the purchase of the same lands thereat is only a payment.

If the first tax deed is in fact valid in every respect and if all preliminary requirements have been satisfied, the duty is clear.

A duty to pay other taxes is not clear in case the first tax deed is void or voidable unless there has been possession under it. In case of such possession successive purchases are only payments.

There are authorities to the effect that one who holds under a tax deed, whether valid or void, who has not gone into possession may *abandon* his claim of title and buy at a subsequent tax sale.

The foregoing rules are set forth in 37 Cyc., pages 1351 and 1352 and cases cited thereunder. None of the cases cited are New York cases.

Would the mere purchase at a subsequent sale constitute an abandonment under the earlier sale?

The conclusion must be reached that a person holding a tax deed is the owner of the lands described or is not the owner of such lands, regardless of his views on the subject. Title is either in him or in someone else. The expression is sometimes found that a purchase may be made at a tax sale to confirm a title already claimed. Confirmation must be construed as meaning a payment on lands already owned. One may own an undivided interest in lands or some specific right, title or interest in and to lands, but a title cannot be so indefinitely vested that it may be in one person or another *at the same time*. There can be no such thing as a 50 per cent title.¹ One claiming title may in his own opinion or the opinion of his attorney have a 50 per cent or a 90 per cent chance of securing a judgment of the court in his favor that he is the owner, but the court will hold that he either owns or does not own — that he has a 100 per cent title or nothing.

A dispute may exist between two or more persons or a question may arise as to which is the owner of a parcel of land. One of the disputants may secure a conveyance from the others and may pay a consideration for the purpose of settling the dispute, although he may have been the real owner and although a court may have so adjudged had the questions at issue been submitted to the court.

Blackwell on Tax Titles, 5th Ed., at page 504 and following pages, gives a summary on the subject as to who may purchase a tax title. This summary is very exhaustive although not decisive as to all questions.

There are so many grounds on which a purchase at successive tax sales may after the first purchase constitute a payment only, that each state of facts will require special consideration and in general a judicial determination.

The courts of the State of New York have apparently been called upon to consider these questions very infrequently.

People *ex rel.* Robinson v. O'Keefe,² is authority that where

1. See *Thompson v. Burhans*, 61 N. Y. 52, 67.

2. 17 Wkly. Dig. 536; *af.* 100 N. Y. 572.

the *owner* of property acquires a certificate of sale for taxes, the title merges. This follows the general rule.

Chard v. Holt,³ involved two successive tax sales but under stipulated facts the first tax sale and deed were considered valid and vested an absolute title. Under these circumstances a subsequent purchase constituted a payment. So this decision is of little assistance, excepting that the court expressed some views which may be considered *obiter*.

The court recognized the doctrine of merger and stated that the natural result of the second sale and the right under the certificate, merged, and continued as follows:

“But it is certainly not unusual for the owner of a tax title to buy in under a subsequent tax sale and to take a deed thereunder to strengthen and confirm his original title. It may be that when the proceedings are perfected by the execution of a deed and the expiration of any right of redemption, the last title, if the tax proceedings were regular, will be the real title.”

These remarks are subject to criticism for if there be an original title there would be nothing to strengthen or confirm; a second purchase would be a payment. The “last title” mentioned would be the “real title” only if the first deed should be found to be void, followed by a failure of entry and occupation. One claiming under a defective conveyance may by actual possession even of only part of the land described, secure constructive possession of all.⁴

In *Powell v. Jenkins*,⁵ the court considered the principle that one whose duty it is to pay taxes may not neglect such payment and allow the lands to be sold, and purchase same and thus add to or strengthen his title; such a purchase would operate as a payment leaving the title as it was before. This is true even though the

3. 136 N. Y. 30.

4. *Thompson v. Burhans*, 79 N. Y. 93, 9.

Wiechers v. McCormick, 122 A. D. 860; 107 N. Y. Supp. 835.

See also *Doud v. H. H. C.*, 178 A. D. 748; 165 N. Y. Supp. 908.

5. 14 Misc. 83, 93; 35 N. Y. Supp. 265.

purchase is made by a third person as agent or if a third person should purchase and then convey to the one owing the duty.⁶

Although one may not owe a duty to pay taxes it may be to his interest to do so. If he has only an interest and no duty he may purchase and acquire a title. To illustrate: a mortgagee may purchase at a tax sale and take a certificate of sale; he does not thereby pay the taxes.⁷

The rule has been stated that if anyone having a right to redeem becomes a purchaser at a tax sale, it is merely a payment of the taxes. A purchaser at a previous sale although a deed has not been issued to him, may be included among those having a right to redeem and following the rule could not acquire a title under a subsequent sale.

Section 127 of the present Tax Law specifically provides that any person having an interest in lands at the time of the sale thereof may redeem. Such redemption would amount to a payment only.

On the other hand, the statement is found in Blackwell on Tax Titles, Fifth Edition, at page 510, that one who holds a defective title or a mere paper title may purchase a better title at a tax sale. Two cases are cited to sustain the proposition — one a Missouri decision and the other a Pennsylvania decision.

Section 127 of the Tax Law provides for a period of one year after the sale within which redemption may be made; also that the purchaser of any wild, vacant or unoccupied lands shall not enter into possession during such year.

After the expiration of one year from the time of the sale following certain specified formalities, a deed shall be executed conveying the lands not redeemed "which shall vest in the grantee an absolute estate in fee simple, subject to all claims which the State may have thereon for taxes."⁸

6. See also *Turner v. Boyce*, 11 Misc. 502, 12, 13; 33 N. Y. Supp. 433.

7. *Williams v. Townsend*, 31 N. Y. 411.

8. Section 131, Tax Law.

The person to whom such deed is issued takes subject to other taxes which he should pay.

Notwithstanding the execution and delivery of such tax deed, if the land described therein is actually occupied, the grantee therein shall within one year from the expiration of the time to redeem, serve a notice on the occupant. Until such notice is served and until the expiration of the time to redeem mentioned in such notice, the tax deed shall not be recorded. The evidence of the service of notice (in case of an occupancy and service) shall be recorded with the tax deed.⁹

In case of an occupancy and a failure to serve notice and the failure to record with the tax deed proof of service of such notice, the tax deed is void.¹⁰

Considering the provision in Section 131 of the Tax Law alone that the tax deed "shall vest in the grantee an absolute estate in fee simple," if there were no contingencies or if same could not be declared void, the duty of the holder thereof to pay other taxes would be absolutely clear. It is for the reason that such a tax deed may be void or may be declared void or voidable, notwithstanding any presumptions, that the question arises as to whether a title may result from a subsequent purchase and deed.

If one taking a tax deed and recording same does not enter into actual possession thereunder and enjoy the fruits of his purchase but fails to exercise the privilege afforded him, he should not by failing to enjoy such privilege be heard to say that he is not liable for other taxes and neglect to pay them until the premises are again offered for sale for unpaid taxes, unless he formally *abandons* any claim under the first tax deed.

Chapter 695 of the Laws of 1921 makes provision for the abandonment of a claim of title under a tax deed under certain

9. Section 134, Tax Law.

10. *People v. Ladew*, 189 N. Y. 355.

People v. Baker, 180 A. D. 275; 167 N. Y. Supp. 591; 183 A. D. 909.

circumstances specified therein. It is Section 140-a of the Tax Law and reads as follows:

§ 140-a. Abandonment of claim of title under tax deeds on cancellation of sale. Before the comptroller shall cancel a tax sale, pursuant to the provisions of this article, and issue his certificate of cancellation, the party, claiming under the tax deed issued from the sale sought to be cancelled, his heirs or assigns, shall deliver to the comptroller an instrument of abandonment of any and all claims and interest under and by virtue of such tax deed duly executed and acknowledged in the same manner as a deed, which shall not affect his right to a refund, together with satisfactory proof that he has not conveyed the land described in such tax deed or any part thereof or interest therein. At the time of issuing his certificate of cancelation, the comptroller shall transmit such instrument of abandonment to the clerk of the county where the land described in such tax deed is situated. The clerk of such county shall record such instrument of abandonment in a book of deeds in his office and index the same as though the party executing it were a grantor in a deed.

There is another view which may help to throw light upon the question being considered. The initial duty to pay taxes rests upon him to whom the State originally grants lands or upon his grantees. If he fails to perform that duty and permits the lands to be sold for taxes, he continues in constructive possession, although not in actual possession, until he has been divested of his title. He may not be divested of his title by a void tax deed alone, even though recorded, unless followed by occupation by the purchaser under a tax deed.¹¹ The duty of the original patentee or his grantee to pay taxes might follow until he has been divested of title by a valid tax deed or by a void tax deed and possession thereunder. So if no possession is taken under a void tax deed, may the duty shift from the original patentee or his successor, to the holder of a void tax deed so as to preclude the holder of such tax deed from purchasing at a

11. See *Doud v. H. H. C.*, 178 A. D. 748; 165 N. Y. Supp. 908.

subsequent sale and acquiring a title thereunder? This is the question which does not seem to have been squarely passed upon by the courts of this State.

The holder of a void tax deed may owe a duty to the State to pay other taxes, but he can owe no duty to the original patentee or his grantee.

Although the original patentee or his grantee fails in his duty to the State and neglects to pay taxes, he cannot be divested of title by a void tax deed alone, not followed by possession on the part of the holder of such tax deed. As to whether the patentee or his grantee in constructive possession only, may lose his title under a void tax deed, see Section 132 of the Tax Law and the consideration of same.¹²

The duty of one holding a tax deed voidable only, may be greater than the duty of one holding a tax deed absolutely void.

The foregoing discussion, relative to the rights of one taking successive tax deeds, is based on a situation where the sale under which the second tax deed was issued was held after the delivery of the first deed. Other situations arise which may vary the rules set forth.

In making the earlier sales, unpaid taxes were sometimes left out or overlooked and these were included in later sales. Deeds were not always promptly issued or called for by the purchasers. This resulted in considerable confusion in the record.

To illustrate:

<i>Taxes</i>	<i>Sale</i>	<i>Tax Deed</i>
1849	1852	1855
1845-48 inc.	1853	1856
1850	1853	1856
1851	1854	1857

The illustration shows four sales before any deed was delivered. Clearly the same person may appear and purchase at all of

the four sales. A duty to pay taxes after the first sale would not arise until a deed had been delivered. Any one of such tax deeds, delivered, may convey a good title and the purchaser may rest on any one of such deeds for his title. If any one of the deeds is valid the purchases, following which the other deeds were issued, would in effect be payments.

In certain instances, there were unpaid taxes assessed prior to a sale and prior to a deed.

To illustrate:

<i>Taxes</i>	<i>Sale</i>	<i>Tax Deed</i>
1861	1871	1875
1871	1881	1887

On the receipt of the deed in 1875 and the acceptance thereof, the duty arose to pay the unpaid taxes of 1871. The deed of 1887 was in effect no deed.

On the acceptance of a tax deed, the duty arises to pay taxes assessed previous or subsequent thereto.

When a person purchases at a tax sale, receives a tax deed of the land, records it and afterwards sells the property, such person certainly claims to own such property and it is his *duty* to pay all taxes assessed against the same from the date of his purchase to the time he sells, and also such taxes as were liens at the date of his tax purchase. The purchaser from such tax title holder also claims to own, so it is his *duty* to pay all taxes assessed against the property. As between the two the duty may be a matter of contract between them. The duty would vest on the grantor if he gives a warranty deed; otherwise, if he quit-claims only.

Although a tax deed may be void and may be so declared by the courts, until so declared void there is a presumption as to its validity and it is undoubtedly the duty of the holder of such deed to pay all taxes assessed against the land described therein previous to the decision of the courts declaring the deed void. If, instead of paying such taxes, the holder of the tax deed permits the lands to be offered for sale and sold again, his purchase might amount to a payment only.

The following may be stated as a summary:

If a person appears at a tax sale and bids on a particular parcel or tract of land offered for sale for the non-payment of taxes or assessments thereon, which parcel or tract he does not claim to own as an heir, devisee or by a conveyance or other instrument, and if his bid is accepted and he pays the amount bid by him, it is not a payment of the tax or assessment but a purchase of the land. Such purchase puts him in the position of one claiming title thereto, especially if he later secures a tax deed or if the time for the delivery of such tax deed has arrived and if he is entitled thereto. Thereafter, he should pay other taxes or assessments against the same land and not permit the land to be offered for sale again. He should not be permitted to purchase it again, unless he has formally abandoned any claim of title under his original purchase. Such abandonment might be evidenced by an instrument in writing executed and acknowledged as a deed. Such instrument could be recorded in the county clerk's office in the same manner as is provided by Chapter 695 of the Laws of 1921.

Second. Purchase by Tenant in Common.

It very frequently happens that lands sold for unpaid taxes are owned by tenants in common and that one tenant in common appears at a tax sale, bids and takes a deed in his own name. He cannot by so doing secure a title as against his co-tenants even if the proceedings are regular and the deed is valid on its face. To quote from *Clark v. Kirkland*:¹³

"Kumrow, as tenant in common, owned an undivided part of the whole lot in 1901, when the assessment was made. There was no separation of his ownership. It extended over the whole tract. By virtue of this ownership his possession was the possession of his co-tenants — his ownership was for their common benefit. He could not acquire a tax title individually against Finch and Cole. Whatever title passed

13. 133 A. D. 826, 31; 118 N. Y. Supp. 315; af. 202 N. Y. 573.

by such a deed would inure to the advantage of all three of the owners. He could not accept a title to their prejudice. (*Burhans v. VanZandt*, 7 N. Y. 523.)”

Third. Purchase by State.*

The State has bid in and purchased the same land at successive tax sales. If the first tax deed was valid, the second was ineffectual, “as the State could not sell its own land for the non-payment of taxes.”¹⁴

If the first tax deed was void, the State would not by giving a subsequent patent, convey any title thereby.¹⁵

Where lands of the State are assessed together with other lands not owned by the State, as a single tract, and where the whole tract is advertised for sale but bid in by the State, the Comptroller refusing to receive bids from parties attending the sale, the sale of so much of the land as was not owned by the State, is illegal. It was held in *Wheeler v. State*,¹⁶ that this was “an illegal appropriation of the lands of the plaintiffs and to confer no title thereto on the State.”¹⁷

Fourth. Sale to County.

Section 123 of the Tax Law also provides for a deed from the Comptroller to the “board of supervisors” and that such board shall hold the title “in trust for their respective counties.”

A. SALE BY COUNTY.

Section 158 of the Tax Law provides that when the county treasurer shall sell, the provisions of the Tax Law relating to sales by the Comptroller shall govern and control the action of the county treasurer.

A deed from a county treasurer to the *county* instead of to the *board of supervisors* was held to convey no title.¹⁸

* See also B. C. & G. Anno. Con. Laws, 2d Ed., Vol. 8, p. 8413.

14. *Thompson v. Burhans*, 61 N. Y. 52, 62.

15. *Wheeler v. State*, 190 N. Y. 406.

16. 190 N. Y. 406, 9.

17. See Section 123, Tax Law.

18. *Matter of Morse*, 189 A. D. 803; 179 N. Y. Supp. 295; 190 A. D. 946.

If a tax deed is made to the board of supervisors, the lands described therein may be conveyed by them by the action of "a majority of such board at any regular or special meeting thereof."¹⁹

Where a deed was executed by the chairman and clerk of the board of supervisors without any action of the board it was held not to be a compliance with the provisions of the statute.²⁰

19. Section 123, Tax Law.

20. Powell v. Jenkins, 14 Misc. 83, 91; 35 N. Y. Supp. 265.

CHAPTER XL.

Summary.

When called upon to determine the validity of a particular tax deed and whether a good title passed by same, the following steps should be taken:

First. Ascertain if the same grantee held a prior tax deed or tax certificate of the same premises, when he secured the tax deed in question.

Second. Determine whether the description in the tax deed is definite and certain and whether the deed is properly executed.

Third. Ascertain if the premises were occupied when notice should have been served under Section 134 of the tax law, in case there is no proof of service of such notice.

Fourth. Ascertain whether the taxes or some part thereof for the alleged non-payment of which the sale was made, were in fact paid.

Fifth. Determine whether there were any jurisdictional defects.

Sixth. Ascertain whether there were any other defects which would make the sale void or voidable.

CHAPTER XLI.

Remedies — Generally.

- First. Actions to Remove Clouds on Title.
- Second. Actions to Cancel Tax Deeds.
 - A. Actions Against the State.
- Third. Actions to Determine a Claim.
- Fourth. Ejectment.
- Fifth. Generally.

Much confusion has resulted by reason of the fact that there are different remedies where the rights of one having a tax deed and one claiming adversely thereto are concerned. The one claiming adversely to the holder of the tax deed might do one of the following things:

First. Bring an action in equity to remove a cloud on title.

1. Plaintiff must have actual or constructive possession.
2. Plaintiff must claim title, or claim under or through someone claiming title.
3. There is no limitation as to time, unless the ten year provision in Section 388 of the Code of Civil Procedure applies.¹ (Section 53, Civil Practice Act.)
4. The defect complained of must not appear in the instrument.

Second. Bring an action to cancel the tax deed under Section 132 of the Tax Law.

1. Plaintiff must have actual or constructive possession.

1. Ford v. Clendenin, 215 N. Y. 10.

CODE references. See Author's Note and Distribution Table — page xxiv.

2. Plaintiff must claim title, or claim under or through someone claiming title.

3. Plaintiff is limited as to time as provided by the section.

4. Defect may or may not appear in the instrument.

Third. Bring an action to determine a claim to real property under Section 1638 *et seq.* of the Code of Civil Procedure. (Section 500, Real Property Law.)

1. Plaintiff must have actual or constructive possession.

2. Plaintiff must prove his source of title as provided by Section 1639 of the Code. (Section 501, Real Property Law.)

3. There is no limitation as to time, unless the ten year provision in Section 388 of the Code applies. (Section 53, Civil Practice Act.)

Fourth. Bring an action in ejectment under Section 1496 *et seq.* of the Code of Civil Procedure. (Section 990, Civil Practice Act.)

1. Plaintiff must be out of possession and defendant must be in possession.

2. Plaintiff must prove his title.²

3. There is no limitation as to time, unless the ten year provision in Section 388 of the Code applies.³

The holder of the tax deed might do one of the following things:

First. Enter peaceably if the land is vacant; or

Second. Bring an action in ejectment as aforesaid.

Third. If in possession under his tax deed, he might maintain an action in equity to remove a cloud on title or an action to determine a claim to real property under Section 1638 of the Code of Civil Procedure.

2. See Section 960, Code of Civil Procedure; Section 335, Civil Practice Act.

3. See also Sections 365 and 367, Code of Civil Procedure; Sections 34 and 36, Civil Practice Act.

CODE references. See Author's Note and Distribution Table—page xxiv.

First. Actions to Remove Clouds on Title.*

A void tax deed gives no title on the issuance or recording thereof. The Legislature cannot give it the effect of transferring a title, for as was said in *Joslyn v. Pulver*,⁴ that would be "legislative despotism." It is at the most a cloud on title. If not prohibited, or limited as to time by statute, the owner may bring an action at any time to have a tax deed declared void and a cloud on title or to have it cancelled.

There appears to be a distinction between an action to remove a cloud on title and an action to cancel a tax deed. There may be a limitation as to the time in which the tax deed may be cancelled without a limitation as to the time when an action can be maintained to remove the cloud.

The Court in *Ford v. Clendenin*,⁵ in considering the effect of a Statute of Limitations as applied to an action in equity to remove a cloud on title, stated:

"The plaintiff's cause of action, which concededly is one in equity to remove a cloud on title, is barred by the statutes quoted unless the right of action * * * is a continuous one accruing from day to day against which the Statute of Limitations does not apply or which perhaps more accurately stated is by reason of its continual repetition one against which the Statute of Limitations does not run.

It is well settled that an owner in possession has a right to invoke the aid of a court of equity at any time while he is so the owner and in possession, to have an apparent, though in fact not a real incumbrance discharged from the record and such a right is never barred by the Statute of Limitations. It is a continuing right which exists as long as there is an occasion for its exercise. * * *

The owner of real property who is in possession thereof may wait until his possession is invaded or his title is attacked before taking steps to vindicate his right. A person claiming title to real property but not in possession thereof

* See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 3, p. 495.

4. 59 Hun, 129, 34; 13 N. Y. Supp. 311; af. 128 N. Y. 334.

5. 215 N. Y. 10.

must act affirmatively and within the time provided by the statute. Possession is a continuing right as is the right to defend such possession. So it has been determined that an owner of real property in possession has a continuing right to invoke a court of equity to remove a cloud that is a continuing menace to his title. Such a menace is compared to a continuing nuisance or trespass which is treated as successive nuisances or trespasses, not barred by statute until continued without interruption for a length of time sufficient to affect a change of title as a matter of law.”⁶

It was further held that if the property is in the possession of another, the person claiming a cause of action in equity against the one in possession must assert it within the time prescribed by statute or he will lose his right to maintain it. Section 388 of the Code of Civil Procedure was held to apply.

It is to be noted, however, that the court had previously declared that the Legislature may not deprive the owner of real property of every remedy but that it may deprive him of certain forms of relief. This raises the question as to whether when a specific cancellation is provided for by the Legislature, an exclusive remedy is thereby created.

Judge Parker stated in *Loomis v. City of Little Falls*,⁷ as follows:

“It is true, * * * that it is an acknowledged branch of equity jurisdiction to remove clouds from the title to real property, but the Legislature has the power to deprive parties of that particular remedy. It may not deprive them of every remedy, but so long as an adequate remedy is afforded to a party injured the Legislature acts within its authority when it deprives the courts of power to give relief in certain forms of actions.”

In *Schroeder v. Gurney*,⁸ the doctrine was stated “that when a person is apprehensive of being subjected to a future incon-

6. See also *Miner v. Beekman*, 50 N. Y. 337.

7. 176 N. Y. 31.

8. 73 N. Y. 430, 4.

CODE references. See Author's Note and Distribution Table—page xxiv.

venience" "a court of equity will interpose its power to set aside or cancel an instrument which is absolutely void."

"The ground of relief * * * is the danger that the rights of the complaining party may be put to hazard by reason of the cloud cast over the title to his land. * * * An idle or groundless suspicion or a baseless fear is not sufficient to authorize such an action. * * * It must appear that there is some difficulty or obstacle which may interfere with the enjoyment of the plaintiff's rights and affect the title to his land."

*Sanders v. Downs*⁹ was an action to set aside a tax deed as a cloud upon title. The defect complained of was one in the assessment. The case was termed "a border one," but the defect was held to be serious for the reason that to hold otherwise would encourage lax or careless methods on the part of officials.

To quote from *Hicinbotham v. Village of N. Pelham*:¹⁰

"It is a familiar rule that such an action will not lie when the alleged invalidity appears upon the face of the record, or in any proof which the claimant is required to produce in order to maintain an action to establish his title, for the reason that a title obviously void does not constitute a cloud upon the title of the true owner."

If one claiming under a tax deed, in order to assert any rights thereunder, would of necessity disclose a defect making the instrument void, an action to cancel same as a cloud on title would not lie under the decision of *Clark v. Davenport*.¹¹ It was held that the danger must not be merely speculative, but that there must be an actual claim of title under the instrument attacked.¹²

Where, however, the statute makes the tax deed presumptive evidence that there were no defects, the one holding same and as-

9. 141 N. Y. 422.

10. 144 A. D. 698.

11. 95 N. Y. 477.

12. See also *Dederer v. Voorhies*, 81 N. Y. 153.

Bussing v. City of Mt. Vernon, 198 N. Y. 196.

Elmhurst Fire Co. v. City of N. Y., 213 N. Y. 87.

serting rights thereunder need not disclose the existing defects. He can rest on his tax deed until the defects are shown by the one attacking it.

Unless it is alleged and proven that the instruments attacked are valid upon their face and that it is necessary in order to establish their invalidity to resort to extrinsic evidence, an action cannot be maintained for the reason that it is not shown that it is necessary to resort to equity; it fails to show that plaintiffs have an adequate remedy at law and that an action of ejectment might not be maintained.¹³

In an action to remove a cloud on title or to quiet title,¹⁴ plaintiff must prove title from

1. The original patentee, or
2. Some grantee in possession, or
3. From one who is a common source of title of both parties.¹⁵

One holding a tax deed may not determine its validity by bringing an action to have the deed of the former owner declared to be a cloud and invalid by reason thereof. The tax deed is the cloud, if any. There can be no cloud unless there is a title to be clouded. If the tax deed is valid, the deed of the last owner is ineffectual but not a cloud.

If the holder of a tax deed valid on its face has been in possession for one year, he might attack an instrument as a cloud and as an apparent lien or encumbrance, when the invalidity of the instrument can only be established by extrinsic evidence.¹⁶

Second. Actions to Cancel Tax Deeds.

There is a distinction between an application to cancel a tax sale and an action to have a tax deed cancelled. A cancellation of

13. *Whitney v. C. I. Co.*, 176 A. D. 157; 162 N. Y. Supp. 507.

14. See also *NOTE*, N. Y. Ct. of Ap. Rep., Bender Annotated Ed., Bk. 26, p. 474.

15. *Dooley v. P. & G. Mfg. Co.*, 158 A. D. 429; 143 N. Y. Supp. 650.

16. See *Schroeder v. Gurney*, 73 N. Y. 430.

a tax sale and deed on the application of an owner without notice to the holder of the tax deed is void.¹⁷

Application for cancellation of a tax sale cannot be made by the owner where the lands are in a county including a portion of the Forest Preserve.¹⁸

“While it may be doubted whether the provisions of cancellation upon direct application to the Comptroller afforded the owner a remedy * * *, the remedy by action in equity was preserved without any limitation of time.”¹⁹

A long delay might be regarded as *laches*.²⁰

As has been pointed out, in order to maintain an action to remove a cloud on title, the defect must not appear in the instrument itself or upon the face of the record. The same rule may not hold with reference to an action to cancel a tax deed.

The gist of the action is to secure the cancellation of an instrument affecting, or purporting to affect, the title of the plaintiff and which he alleges to be invalid and void. In the case of tax sales it amounts to an allegation by the plaintiff that he is the owner of land which has been sold and that a deed or lease thereof has been given, creating an apparent paramount title in defendant, which deed or lease plaintiff asks to have cancelled.

See *Sanders v. Parshall*,²¹ in which it was held that “the defendant’s title is apparently good; but is, in fact, totally bad.”

Clark v. Kirkland,²² was an action brought under Section 132 of the Tax Law, in which the plaintiff succeeded. The opinion contains much of interest on the subject under discussion.

17. *Ostrander v. Darling*, 127 N. Y. 70.

18. See Section 140, Tax Law.

People v. Roberts, 151 N. Y. 540.

19. *People ex rel. McGuinness v. Lewis*, 127 A. D. 107, 15; 111 N. Y. Supp. 398.

20. *People ex rel. Staples v. Sohmer*, 206 N. Y. 39, 45.

21. 67 Hun, 105; 22 N. Y. Supp. 20; af. 142 N. Y. 679.

22. 133 A. D. 826; 118 N. Y. Supp. 315; af. 202 N. Y. 573.

The action to cancel a tax deed will lie whenever the statute makes it presumptive evidence of the regularity of the antecedent proceedings upon which the tax deed is based and when such presumption can be negatived by proof outside of the record.

In order to maintain an action under Section 132 of the Tax Law, plaintiff need not prove his source of title as provided by Section 1639 of the Code. It is enough if he claims title or claims some right or interest under or through someone claiming title, of which he might be deprived by reason of a void tax deed.

While a failure to bring an action to cancel a tax deed within the time limited by statute, will prevent such an action after the limited time has expired, it does not necessarily mean that there has been a transfer of title to the holder of the void tax deed. The title may remain as before and a void tax deed may remain a cloud.²³

A. ACTIONS AGAINST THE STATE.

An action to cancel a tax deed held by the State, cannot be maintained against the State or against State officials. This was decided in *Sanders v. Saxton*,²⁴ reversing the lower courts, it being held that "it is elementary law that the State being a sovereign cannot be sued except with its own consent."

A publication by the Comptroller under Section 133 of the Tax Law has been held to be a consent to be sued.²⁵

There has been only one advertisement by the Comptroller under Section 133 and that was in or about the year 1893, when he advertised a large number of parcels.

Third. Actions to Determine a Claim to Real Property.*

There may be no particular difference between an action to cancel a tax deed, an action to remove a cloud on title and an action to compel the determination of a claim to real property.

23. *Ford v. Clendenin*, 215 N. Y. 10.

24. 182 N. Y. 477.

25. *People v. Inman*, 197 N. Y. 200.

* See also *Fiero on Special Actions*, Fourth Ed., Vol. 1, p. 257.

CODE references. See Author's Note and Distribution Table—page xxiv.

See *M. M. Co. v. W. R. Co.*,²⁶ which was an action under Section 1638 of the Code of Civil Procedure to remove a cloud from plaintiff's title, the cloud being a claim of title under a tax deed.

The real distinction between an action to determine a claim to real property and an action to remove a cloud was set forth in *Meyer v. Wilcox*.²⁷

Under the common law, a party in possession of lands could not maintain an action against a party out of possession for the purpose of trying title. By statute, such an action may be brought under certain conditions and limitations. The action is purely a statutory one and its purpose is to quiet and determine conflicting claims of title.²⁸

General terms and conditions are provided by the Code of Civil Procedure. Actions to determine the validity of a claim made under a tax deed or which it appears might be made from the public records, may be brought under Section 1638 of the Code. In order to bring and maintain such an action, the plaintiff, or those whose estate he has, must have been in possession of the property for one year.

If the defendant makes no claim for affirmative relief, the action proceeds as though it were an equitable action to remove a cloud on title.²⁹

Where the possession has been interrupted by a wrongful entry of another, the one whose possession has been interrupted will not be deprived of his right to bring the action. It will not be considered an interruption in law.³⁰

Before the year 1891, actual possession was necessary, but since that date constructive possession has been sufficient in order to bring the action.³¹

In the absence of actual or constructive possession, plaintiff must establish a legal title. As constructive possession is "the

26. 142 N. Y. Supp. 1094.

27. 136 N. Y. Supp. 337; *af.* 153 A. D. 907.

28. *Lewis v. Howe*, 174 N. Y. 340.

29. *Schroeder v. Gurney*, 10 Hun, 413; *af.* 73 N. Y. 430.

30. *Donohue v. O'Connor*, 45 Super. Ct. 278.

31. *M. M. Co. v. W. R. Co.*, 142 N. Y. Supp. 1094.

Vanderveer Crossings v. Rapalje, 133 A. D. 203, 6; 117 N. Y. Supp. 485.

CONE references. See Author's Note and Distribution Table — page xxiv.

possession in law which follows in the wake of title" the plaintiff by showing legal title could maintain the action as a constructive possessor.³²

The defendant may plead his own title and demand affirmative relief. If he does, the action proceeds as one in ejectment and defendant is entitled to a jury trial.³³

The distinction between an action to determine a claim to real property and an action in ejectment was pointed out in *P. S. F. Co. v. Smith*.³⁴

Fourth. Ejectment.*

"The plaintiff in ejectment must succeed on the strength of his own title, not on the weakness of the defendant's," although there are certain exceptions. "Where a legal title is established by neither party, the one showing the prior possession * * * will be deemed to have the better right. * * * Possession is always sufficient to recover as against a mere trespasser or intruder without title."³⁵

Where "the plaintiff did not trace his paper title back to the original patentee, or to a common source, and" where "the land was uncultivated and there was no possession shown in the person under whom the plaintiff claims to hold, there was a failure to establish * * * a title."³⁶

The rule that the plaintiff must succeed upon the strength of his own title was held to have no application in an equity action to determine title.³⁷

32. *Vanderveer Crossings v. Rapalje*, 133 A. D. 203; 117 N. Y. Supp. 485.

33. See Section 1641 *et seq.*, Code of Civil Procedure; Section 503, Real Property Law.

King v. Ross, 28 A. D. 371; 51 N. Y. Supp. 138; *af.* 156 N. Y. 681.

Ryan v. Murphy, 116 A. D. 242; 101 N. Y. Supp. 553.

34. 99 Misc. 108; 163 N. Y. Supp. 615.

* See also *NORE*, N. Y. Ct. of Ap. Rep., *Bender Annotated Ed.*, Bk. 29, p. 145. *Fiero on Special Actions*, Fourth Ed., Vol. 2, p. 1241.

35. *People v. Inman*, 197 N. Y. 200, 5, 6.

36. *Judd v. Chilson*, 177 A. D. 121; 163 N. Y. Supp. 695.

See also *Young v. Shulenberg*, 165 N. Y. 385.

37. *Nehasane Park Assn. v. Lloyd*, 167 N. Y. 431.

Plaintiff cannot succeed if he fails to prove that the defendant was in possession of any part of the premises in question at the time the action was brought.³⁸

Section 1502 of the Code of Civil Procedure provides, however, that if the property is not actually occupied, the action might be brought against some one exercising acts of ownership thereupon or claiming title thereto.

Fifth. Generally.

The distinctions between the four remedies mentioned cannot always be harmonized. Sometimes actions are brought as in the cases cited, where two or three kinds of relief are sought in one action. The question of possession is always troublesome if there is no person actually on the ground at the time. As constructive possession follows the legal title, there may be one having title and constructive possession, another actually occupying and in actual possession without any right or title and still another claiming under a tax deed. Great care should be exercised in selecting or grouping the remedy or remedies to be adopted.

38. *Kraus v. Birnbaum*, 200 N. Y. 130.

CODE references. See Author's Note and Distribution Table — page xxiv.

SOURCES OF TITLE

TABLE ONE.

Following is a tabulation of various sources of title to unoccupied real property, and the methods by which it may be granted, transferred or surrendered. The element of occupation or actual possession is absent. This excludes any titles arising through adverse possession or prescription.

FIRST. *Primary sovereign* sources which include:

- A. Dutch Colonial Patents,
- B. English Colonial Patents,
- C. State legislative grants.

SECOND. *Delegated sovereign* sources which include:

- A. Chartered proprietary grants.
- B. Patents from Commissioners of the Land Office.
- C. Deeds by Superintendent of Public Works or other public official.

THIRD. Other *sources* of title may be termed *intermediary*. They generally arise as the result of some act or inaction on the part of one to whom a title has been granted as aforesaid.

Third.—Intermediary Sources.

The principal statute on the subject of intermediary sources is Section 242 of the Real Property Law which may be analyzed as follows:

An estate or interest in real property, * * * or any trust created, granted, assigned, surrendered or declared, unless or power, over or concerning real property, * * * cannot be

- (1) by act or
- (2) operation of law, or
- (3) by a deed or conveyance in writing, * * *.

But this section does not affect the power of a testator in the disposition of his real property

- (4) by will;

nor prevent any trust from arising or being extinguished

- (5) by implication or
- (6) operation of law,

nor any declaration of trust * * *

- (7) by a writing * * *.

Following the language of this Statute, such sources of title will be grouped, in their primary analysis, as follows:

First. Those sources created by *instruments* specifically mentioned in the section.

Second. Those sources therein referred to as arising "*by act or operation of law.*"

Third. *Implied* trusts.

First.—Consideration will first be addressed to those *instrument sources* specifically mentioned. These will be divided into the following groups:

- A. Deeds or conveyances in writing.
 - 1. Direct
 - 2. By delegation.
- B. Wills.
- C. Declared trusts.

A. *Deeds or Conveyances in Writing.*

It seems evident from the Statute that the words "deed or conveyance" relate not to a duality but to a unity of idea — that is;

they are used identically and not alternatively. Section 240, Real Property Law, gives no definition of what is a "deed" but merely defines a "conveyance" as follows:

"The term 'conveyance,' as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered."

Conveyances may be subdivided as follows:

1. *Direct.*

Instruments executed by individuals or corporate or collective entities in their own behalf including instruments in the nature of boundary line agreements, an incidental effect of which is to transfer, surrender or otherwise affect title to land.

2. *By delegation.*

(a) Instruments executed by agents, attorneys or fiduciaries in behalf of individuals or corporate or collective entities.

(b) Instruments executed by a referee, trustee, receiver, committee, master, sheriff, comptroller, county treasurer or other officer of the court or public official.

B. *Wills.*

C. *Declared Trusts.*

In the case of express trusts there is either a vesting of title, or a power of sale, in a trustee who can convey during the life and for the purposes of the trust. This vesting of title or power is accomplished by a deed, declaration of trust or by will creating the trust and designating a trustee.

Second.—Consideration will now be had of that general class of *sources* of title comprehended within the words "*by act or operation of law.*" This language clearly indicates an intention to include both statutory and judicial law. Such statutes and rules of law may be classified so as to include sources of title arising as follows:

- A. *Tax Titles* which include those titles initiated through the operation of the statutes authorizing the sovereign state to sell the property of a former owner for unpaid taxes. The former title in such cases is extinguished and a new title initiated by the act of the Comptroller or County Treasurer, or other authorized official, in selling and conveying to the highest bidder. These titles are based upon principles of notice and opportunity to be heard and opportunity to redeem. Within this class may be included such titles as result from the sale by the City of New York, under the provisions of the Greater New York Charter, of the lien of the City for taxes and the subsequent foreclosure of such lien through jurisdiction acquired in a court proceeding.
- B. Titles arising as a result of statutes relating to *attainder* which include such titles as arise by reason of the operation of the statutes authorizing a sale of the property of persons attainted for treason, either through the Commissioner of Forfeiture under former acts, or through the Alien Property Custodian under the provisions of the Trading with the Enemy Act. These titles arise, of course, only during a war emergency.
- C. Titles arising as a result of statutes relating to *escheat* which comprehends that class of titles which comes into being by reason of the death of the prior owner without heirs or will or other disposition, resulting, either automatically or through actions brought by the Attorney General in establishing escheat in the sovereign power.
- D. *Eminent Domain* which embraces that class of cases where private property is acquired for public purposes, pursuant to the provisions of the State Constitution, by the sovereign power, either directly, through condemnation or appropriation by the sovereign itself, or indirectly, through the delegation of the sovereign power to a municipal corporation or to a *quasi*-public corporation or entity, for public purposes.

E. Title may be acquired as a result of Legislative authority to the Superintendent of Public Works, or other public official, to convey lands to which the State has title. In this class of cases is included *reconveyances* of abandoned canal lands.

F. Titles arising as a result of statutes relating to *bankruptcy* which comprehends such titles as emanate from a trustee or assignee in bankruptcy, under the provisions of the Federal laws, operating to vest such title in the trustee or assignee for the benefit of creditors.

The State law is known as the "Debtor and Creditor Law." Article II thereof embraces general assignments to "assignees" for the benefit of creditors. Article III is more like the Federal Bankruptcy Law and provides for a "trustee" who becomes vested with the title to the lands of the insolvent.

G. Titles acquired as a result of the sale of *judgment debtor's* lands being those titles which have their genesis in the provisions of the Code of Civil Procedure authorizing the Sheriff to levy upon and sell property of the former owner who has become a judgment debtor, in case there is not sufficient personal property out of which to satisfy the judgment.

H. *Reverter*. Where an estate has vested in an assignee or other trustee for the benefit of creditors, it ceases after twenty-five years and reverts to the assignor, his heirs, devisees or assigns (Section 110, Real Property Law).

There may also be a *reverter* in case of bankruptcy and title may vest again in the bankrupt after the purposes of the bankruptcy have been accomplished or by lapse of time.

I. Titles arising out of *estoppel* which are predicated upon abandonment or disclaimer by a former owner. They may result from *statements in instruments* or by *acts* alone. Examples of the first class:

1. If "A" conveys to "B" and recites that his title

came from "C" and "A" has no title at the time of the deed to "B," but subsequently acquires such title from "C," the title so acquired from "C" will inure to the benefit of the grantee "B" under the provisions of the warranty and covenant of assurance contained in the deed to "B."

2. Where an owner of two parcels makes a deed of one of the parcels and incorporates in that deed a statement that he conveyed the title to the other parcel to another, such statement constitutes an estoppel resulting in an abandonment or disclaimer by the common owner.

3. Such estoppel may also arise as a result of a judgment or admission in legal proceedings in which jurisdiction has been acquired over a former owner and in which such former owner's title has been determined against or conceded by him.

(For estoppel by *acts*, see TABLE TWO, D.)

J. A fee or an easement therein may be acquired by *dedication* which results from the offer by a private owner to a State or municipality, of his property for public purposes and the acceptance of such offer by the public power.

K. Titles arising as a result of *recitals* contained in ancient deeds and other instruments. Examples:

1. Under the principles of the common law, great weight is attached to recitals in old deeds in the chain of title which recitals are, in general, taken at their face value and allowed a probative force which increases with their age.

2. Under the Code of Civil Procedure, it is provided that a recital as to heirship contained in an instrument which has been recorded for more than thirty years, is conclusive evidence of such heirship.

3. A recital in a deed to the effect that the grantor is unmarried, may be taken as *prima facie* evidence of that fact.

4. The recital of due service in a judgment roll has been held to be *prima facie* evidence of such service.¹

1. Forsyth v. Leslie, 74 A. D. 517.

5. The confirmation of a Referee's report may satisfactorily establish the existence of a missing deed therein recited.²

6. Recitals in orders may establish the existence and contents of missing papers.³

- L.** The *survival* of a husband or wife holding as tenants by the entirety results in the acquisition of title by such survivor to all lands so held.

This also applies to a surviving joint tenant.

A surviving partner acquires title to all lands owned by the co-partners but only for the benefit of the creditors of the partnership.

- M.** Titles arising as a result of the operation of statutes of *descent* which embrace those titles in which the property of a former deceased owner is transferred through the operation of the provisions of the Decedent Estate Law, to his heirs. (Article III, Decedent Estate Law.)

- N.** Titles which have their basis in the provisions of the Decedent Estate Law relating to *posthumous* and *after-born children*. For example :

1. If a man dies seized of property, leaving a child born after his death, such child is "posthumous" and automatically acquires title to his proportionate share in the estate of the decedent.

2. Where a man makes a will devising property and a child is thereafter born, such child is "after-born" and automatically succeeds to his proportionate share in the testator's property, unless the decedent has, by express terms in his will, cut off such after-born child.

An adopted child may have the same rights as an after-born child.

- O.** Titles arising as a result of *judicial decrees* which are based upon the acquisition of jurisdiction over the persons seized

2. *Calder v. Jenkins*, 16 N. Y. Supp. 797.

3. *Alvord v. Beach*, 5 Abbott's Prac. 451.

of the former title as a result of due process of law culminating in a judicial decree. Within this heading may be embraced the foreclosure of mortgages — exclusive, of course, of foreclosure by advertisement — judgments in partition, actions to determine the validity of claims to title, decrees for specific performance, actions to impress a trust, actions of ejectment, and other actions as a result of which the hand of equity reaches out to take the property of one over whom it has acquired jurisdiction and to transfer, or direct its transference through an officer of the court, to another.

- P. Titles arising out of statutes of *foreclosure by advertisement* comprehend those titles which are transferred from the former owner to a new owner through the operation of statutes authorizing the mortgagee to post, serve and publish notices of sale and to conduct such sale through an auctioneer, culminating in a transfer of title through the filing and recording of an affidavit by the auctioneer, setting forth the time, place and terms of sale and the name of the purchaser. It will be noted that this is a proceeding in *rem* and not one in *personam*, as is the case where titles are transferred by an officer of the court following a judicial proceeding.
- Q. *Corporate merger, consolidation, dissolution or termination* resulting in a transfer of title to another corporation or the officers of the corporation.
- R. *Dower and Curtesy* include such *interests* in lands as arise out of the statutory principles vesting an estate in dower in a woman who survives her husband seized of the land, or in curtesy in a man who survives a wife seized of the land, and by whom he had children living at the time of the wife's death.

Third.—Implied trusts are those arising by implication of law to fit the needs of certain contingencies of fact. They embrace

constructive trusts to prevent fraud and resulting trusts to carry into effect the mistaken or imperfectly expressed intention of a grantor or testator. In such cases, there can be no deed from the trustee, as such, unless there is an implied power of sale, in which event the deed is given, by virtue of such power on behalf of the beneficiary. (See Art. IV., Real Property Law.)

TABLE TWO.

There are other sources of title where possession is merely one of the existing elements. They do not arise from possession alone, yet do not exist without possession:

- A. Title may be acquired by a *mortgagee who takes possession* of the mortgaged premises with the consent of the mortgagor and continuously occupies same under the mortgage for a sufficient period to bar the mortgagor or his successors in interest from asserting a right of redemption.
- B. A *tenant in common* may acquire title against his co-tenant when his tenancy is coupled with possession. An ouster of the passive co-tenant may then be presumed, title being predicated upon the theory of abandonment and surrender of rights by the ousted co-tenant.⁴
- C. Titles may arise by *presumption*. There are here included those cases where the surrounding circumstances, which may include an element of possession and lapse of time, indicate a lost or unrecorded instrument.⁵
- D. *Estoppel in pais* results from the conduct of a party who, having both occasion and duty to speak, intentionally or unintentionally, fails in such duty, and thereby permits another to be misled to his detriment. Example:

4. Sweetland v. Buell, 89 Hun, 543; af. 164 N. Y. 541.

5. Roe v. Strong, 119 N. Y. 316, 22.

McRoberts v. Bergman, 132 N. Y. 73, 82.

"A" sells "B" a part of his farm and misinforms "B," even unintentionally, as to where the division line would run. If "B" had to rely upon the express description contained in the deed, his title would be limited thereby, but by estoppel and possession it will extend to that which "A" represented it to include.

- E. A holder of a written instrument which does not of itself convey a title may acquire title, nevertheless, by entering and remaining upon the lands described therein and claiming title thereunder. The former owner may not only be barred from maintaining an action in ejectment but his title may be extinguished. This has no reference to a title created by adverse possession and occupation alone without a claim of title under some instrument.

It may be that a *tax deed* should be placed in this classification.

Titles may be *created* by conveyances or other instruments, in the first instance, but the *enjoyment* may be *contingent* upon survivorship or otherwise, and the *time* of enjoyment *deferred*.

In making a classification, the line of demarcation is sometimes very slight and it may be desirable or even necessary to put a particular source in one or another classification—in fact, in some instances to have duplications.

TABLE THREE.

There is another source of title which is gained as a result of an inclosure or cultivation. It is known as title by *adverse possession* and needs no written instrument to support it. The occupation should be open, hostile and adverse and the occupant should claim ownership.

THE FOLLOWING IS A SUMMARIZED TABULATION OF THE VARIOUS
SOURCES OF TITLE ABOVE REFERRED TO:

TABLE ONE.

FIRST. Primary sovereign sources:

- A. Dutch Colonial patents,
- B. English Colonial patents,
- C. State legislative grants.

SECOND. Delegated sovereign sources:

- A. Chartered proprietary grants,
- B. Patents from Commissioners of the Land Office,
- C. Deeds by public officials.

THIRD. Intermediary sources:

First. Instrument sources:

- A. Deeds or conveyances in writing,
 - 1. Direct.
 - 2. By delegation.
- B. Wills.
- C. Declared trusts.

Second. By act or operation of law:

- A. Tax titles.
- B. Attainder.
- C. Escheat.
- D. Eminent domain,
 - 1. Exercise of by sovereign.
 - 2. Exercise of by delegatee.
- E. Re-conveyances.
- F. Bankruptcy.
- G. Sheriff's sales of judgment debtor's lands.
- H. Reverter:
 - 1. Under assignment.
 - 2. Under bankruptcy.
- I. Estoppel by instrument.
- J. Dedication.
- K. Recitals in ancient deeds and other instruments.
- L. Survivorship:
 - 1. Tenants by the entirety,
 - 2. Joint tenants,
 - 3. Partners.

- M. Descent.
- N. Posthumous children,
After-born children,
Adopted children.
- O. Judicial decrees:
 1. Foreclosure of mortgage by action,
 2. Partition,
 3. Action to determine title,
 4. Specific performance actions,
 5. Actions to impress a trust,
 6. Ejectment,
 7. Equity actions generally relating to title to lands.
- P. Foreclosure of mortgage by advertisement.
- Q. Corporate merger, consolidation, dissolution or termination.
- R. Dower and Curtesy.
- Third.* Implied trusts.
 - A. Constructive trusts.
 - B. Resulting trusts.

TABLE TWO.

- A. Mortgagee in possession.
- B. Tenant in common ousting co-tenant.
- C. Presumption of title.
 1. Presumption of heirship.
 2. Presumption of lost deed.
- D. Estoppel in *pais*.
- E. Adverse possession under void written instrument.
 1. Tax deed.

TABLE THREE.

- A. Adverse possession without written instrument.

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APPENDIX I.

From the Reports of the Attorney General for the year 1918 at page 168:

ACQUISITION OF LANDS FOR STATE PARK PURPOSES, CHAPTER 569 OF THE LAWS OF 1916 AND CHAPTER 146 OF THE LAWS OF 1917.

Under the early patents, in and by which the State granted lands excepting and reserving five acres of every hundred acres for highways, the State did not except a fee but reserved an easement only.

INQUIRY.

Under date of May 23, 1918, the Conservation Commission inquired as to whether the State now owns an enforceable one-twentieth undivided interest in all of the lands in and to which it excepted and reserved five acres for every one hundred acres for highways, in and by the patents granting same. The information was desired, in particular, in connection with the acquisition of such lands for State park purposes, pursuant to Chapter 569 of the Laws of 1916 and Chapter 146 of the Laws of 1917.

OPINION.

I have not found any decision which in my opinion positively decides as to whether the question involved is a *reservation* of an *easement* or an *exception* of the *fee*.

DeCamp v. Thompson, 16 A. D. 528 (affirmed, 159 N. Y. 436), at pages 538-9 holds:

"1. That in and by the Macomb patent the State did expressly reserve to itself for highway purposes 5 acres out of every 100 acres of land thereby conveyed;

"2. That the land thus reserved was not specifically designated, but related to the entire tract;

"3. That the power thus reserved authorized the State, at any time, to appropriate five per cent of the land embraced in this tract to highway purposes."

4. That five per cent of each 100 acres need not be appropriated for highway purposes, but that five per cent of the whole tract might be appropriated in any part of the tract granted.

In cases where none of such highways have been laid out or where the full five per cent of the lands granted has not been appropriated to highway purposes, it is in my opinion permissible to consider the probabilities, that is, whether the demands for highways to the full extent of the five per cent, or to any extent, will require the location of highways over and across any particular parcel. In this connection, the physical conditions might be taken into consideration, for instance, a mountain covering a thousand acres of a five thousand acre tract originally granted by the State, might make it physically impossible to locate a highway on said thousand acres.

In connection with the acquisition of lands for State park purposes, which lands had been previously granted by the State under patents containing the five acre exception and reservation, I am of the opinion:

1. That you should treat the person offering the lands as owner of the fee;

2. That the State has only an easement.

I do not find that the State has ever treated the lands excepted and reserved for highway purposes as having been owned in fee by the State. No argument occurs to me in favor of changing the attitude of the State at this time.

The fee of the entire parcel offered should be granted to the State unless there are existing or contemplated highways over and across same. To take the position that the State already had a fee ownership in a portion of the lands offered, would place the person offering such lands where he could not be called upon to

convey the part or interest which the State already claimed to own.

This highway question should be given consideration by you before any offer is accepted. Where an offer has been accepted, I will advise you after examination of title, as to whether the patent contained a highway reservation.

In either case, you should determine:

1. Whether sufficient highways have been laid out in the entire tract granted, to exhaust the five per cent reservation.

2. If five per cent has been appropriated in the entire patent, for highways, you need not be further concerned.

3. If five per cent has not been appropriated, you should then determine as to the feasibility and probability of locating highways over and across the lands offered.

- (a) If you determine that it is not feasible to locate a highway over the lands offered or not reasonably probable that highways will be located over the lands offered, you need not be further concerned.

- (b) If you determine that it is feasible to locate a highway over the lands offered and reasonably probable that highways will be located over the lands offered, you should determine the extent and area of same and deduct the value thereof.

4. As to lands embraced within such existing or contemplated highways, same should be surveyed and described and the area computed and deducted, and no payment should be made therefor. The fee thereof should not be conveyed to the State, but the right of the public to use and cross said highway in common with the owner and to improve and maintain same as a public highway should be conveyed to the State in confirmation of the State's rights under said patent.

In all cases where the State has in and by the patent reserved lands for highway purposes, specific mention of that fact should be made in the proposal and also in the recommendation to the Commissioners of the Land Office, so that it may definitely appear that the question has been given consideration by the Conservation Commission and the price fixed accordingly.

Where it is not feasible to determine whether a highway may be presently located, the land may be offered and accepted "subject to the exception and reservation to the State of five acres for every one hundred acres for highways."

As to the right to acquire an easement only, see Section 50 (paragraph 6) of the Conservation Law, which provides that the Commission shall have the authority to purchase lands, forests "or any interest therein."

The reason for not conveying the fee of existing or contemplated highways to the State is to leave the ownership of the fee and trees outstanding and permit the maintenance of highways in the Forest Preserve. Otherwise, these trees could not be cut and highways maintained without contravening the provisions of the State Constitution. (See Section 7, Article VII, State Constitution.)

I therefore conclude, in answer to your inquiry, that under the early patents, in and by which the State granted lands excepting and reserving five acres of every hundred acres for highways, the State did not except a fee but reserved an easement only; that the State does not now own an enforceable one-twentieth undivided interest in all of the lands so granted.

Dated, July 29, 1918.

MERTON E. LEWIS,

Attorney General.

APPENDIX II.

STATE LAW.

ARTICLE 3.

Cessions to the United States.

Section 20. Cession without reservation.

21. Authorization of acquisition and cession of jurisdiction thereupon without reservation.
22. Cession with reservation of right to serve process.
23. Authorization of acquisition and cession of jurisdiction thereupon, with reservation of right to serve process.
24. Cession during ownership by the United States, with reservation of right to serve process.
25. Authorization of acquisition, and cession of jurisdiction thereupon during ownership by the United States, with reservation of right to serve process.
26. Cession during ownership by the United States and use for public purposes, with reservation of right to serve process.
27. Authorization of acquisition by the United States, and cession of jurisdiction thereupon during ownership by the United States and use for public purposes, with reservation of right to serve process.
28. Cession during use for purposes thereof, with reservation of right to serve process.
29. Authorization of acquisition and cession of jurisdiction thereupon during use for purposes thereof, with reservation of right to serve process.
30. Authorization of acquisition and cession of jurisdiction thereupon, with reservations of concurrent jurisdiction and right to serve process.

31. Cession during ownership by the United States and use for purposes thereof, with sundry reservations.
32. Cession during use for purposes thereof, with sundry reservations.
33. Cession with sundry reservations.
34. Cession during use for purposes thereof, with sundry reservations.
35. Cession of jurisdiction to lands acquired for light-house purposes.
36. Acquisition by condemnation.

§ 20. *Cession without reservation.* Title and jurisdiction has been ceded to the United States by this state as follows:

1. Little island in Hudson river. A tract of land known as Little island, in the Hudson river, opposite New Baltimore, acquired by the United States for a light-house site and keepers' dwellings.

2. Lands in West Oswego. For the purpose of excavating and removing the same, to improve the navigation of the Oswego river, all the right and title of the state of New York in and to the following described property, namely: Lots one hundred and twenty-three, one hundred and twenty-four and one hundred and twenty-five in fortification block number two in West Oswego, New York, the same being part of the island situate in the Oswego river near its mouth.

§ 21. *Authorization of acquisition and cession of jurisdiction thereupon without reservation.* The United States has been authorized to acquire the following tracts or parcels of land, and jurisdiction thereof has been ceded to the United States by this state upon such acquisition:

1. On the Long Island coast. Certain tracts of land on the Long Island coast, each tract not exceeding one-half acre in area, for building sites for life saving stations.

2. Priming Hook, Columbia county. A tract of land one-half acre in area at Prymon's Hook, otherwise called Priming Hook point, Columbia county, for a site for a beacon light.

3. Calver's plat, Columbia and Rensselaer counties. A tract or parcel of land consisting of one acre of the south point of

the island known as Calvers plat. Said island lies in the Hudson river, part in the county of Columbia, and part in the county of Rensselaer, and in the town of Schodack; * * * for the construction and maintenance of a light-house, beacons and keepers' dwellings.

4. Near Mull's plat, Rensselaer county. A tract or parcel of land lying in the Hudson river, in the county of Rensselaer, * * * containing an acre of land, be the same more or less, for the construction and maintenance of a light-house, beacons and keepers' dwellings.

5. Poplar island, Rensselaer county. A tract or parcel of land in the town of Schodack, county of Rensselaer, and on the north end of an island known by the name of Poplar island, * * * containing one acre of land be the same more or less, for the construction and maintenance of a light-house, beacons and keepers' dwellings.

6. Water supply at West Point. Such tracts of lands, lands under water, rights of way and easements, at or near the United States military post at West Point, as have been acquired or may be required for the purpose of increasing the water supply of such post, the commanding officer of said post being authorized to enter upon any lands to make surveys thereof for such purpose.

7. Land in the city of Buffalo. Such lands now owned by the state under the waters of Niagara river or in the vicinity of said river in the city of Buffalo, including such lands as are now used for canal purposes in the city of Buffalo and as may be deemed abandoned by the canal board, as may be required by the United States in the construction of a ship canal from Lake Erie to the foot of Squaw island in the city of Buffalo.

8. Sacketts Harbor. In the village of Sacketts Harbor or town of Hounsfield, county of Jefferson, to carry water through pipes from the waters of Lake Ontario and Henderson bay to Madison barracks, for the water supply at that point of the military post of the United States, and to acquire the title of lands necessary for that purpose, or the right of way only. And the state of New York hereby cedes to the United States the right to lay such pipes under and along the highways of said state, provided the same are restored to as good condition as the same were in

before such pipes were laid, and to enter upon said highway and keep the said pipes in repair, upon the same condition, and hereby concedes jurisdiction to the said United States over the lands and franchises which the United States has acquired for the purpose of such water supply, or may acquire.

§ 22. *Cession with reservation of right to serve process.* Title and jurisdiction to the following described tracts or parcels of land have been ceded to the United States by this state on specified conditions * * * :

1. Montock point, Suffolk county. A tract of land at Montock point, in the county of Suffolk, known by the name of Turtle hill, * * * acquired for the erection of a light-house thereon.

2. In Huntington, Suffolk county. All that certain lot, piece or parcel of land at the northern extremity of Eaton's neck, in the town of Huntington, in the county of Suffolk, * * * containing ten acres, acquired for the erection of a light-house thereon.

3. Islands in New York harbor. Three certain islands in and about the harbor of New York, viz.: Bedlow's island and Ellis or Oyster island, bounded on all sides by the waters of the Hudson river, and Governor's island, bounded on all sides by the waters of the East river and Hudson river.

4. Great Gull and Little Gull islands, Suffolk county. Great Gull island and Little Gull island, in the county of Suffolk, and bounded on all sides by the waters of the East river, acquired for the erection of a light-house thereon.

5. Sands or Watch point, Queens county. A tract of land at Sands or Watch point, on Long Island, in the town of North Hempstead, county of Queens, * * * containing five acres of land, be the same more or less, acquired for the erection of a light-house.

6. Galoo island, Lake Ontario. A tract of five acres on the head of Galoo island, in Lake Ontario, * * * acquired for the erection of a light-house thereon.

7. Island near Rouse's Point, Lake Champlain. A small island near Rouse's Point, on Lake Champlain, called Island Point; and also over the land under the water opposite to lots number 60, 61, 62, 63, 64, 65 and 66 of the small lots in the tract of land

heretofore laid out for the Canadian and Nova Scotia refugees:
* * *

8. At mouth of Oswego river. A tract of six acres at the mouth of the Oswego river, and on the southerly side of the Oswego fort, in the county of Oswego, * * * acquired for the erection of a light-house thereon.

9. At mouth of Genesee river. A tract of three acres and 115 rods, at the mouth of the Genesee river, on the west side thereof, being part of village lot number twenty-eight, in the village of Charlotte, in the former town of Gates, and county of Monroe, * * * acquired for the erection of a light-house thereon.

10. In Sodus, Wayne county. A tract in the town of Sodus in the county of Wayne, * * * acquired for the erection of a light-house thereon.

11. At Buffalo, Erie county. A tract of half an acre in Buffalo, Erie county, * * * being part or parcel of a certain township which, on a map or survey of divers tracts or townships of land made for the proprietors by Joseph Ellicott, surveyor, is distinguished by township number eleven, in the eighth range; * * * acquired for the erection of a light-house thereon.

12. At Oldfield point, Suffolk county. A tract of land at Oldfield point, on Long Island sound, in the county of Suffolk, * * * acquired for the erection of a light-house thereon.

13. At Throg's neck, Westchester county. A tract of land at Throg's neck, in the county of Westchester, * * * acquired for the erection of a light-house thereon.

14. In New Utrecht, Kings county. A tract of land in the town of New Utrecht, Kings county, * * * containing sixty acres, one rood and six perches of land; and the second * * * containing sixteen acres and one-half acre of land, acquired for the erection of fortifications thereon.

15. In New Utrecht, Kings county. A tract of land in the town of New Utrecht, Kings county, * * * containing seventeen acres, fourteen perches and one hundred and five yards of land, acquired for the erection of fortifications thereon.

16. In Islip, Suffolk county. A tract of land and beach, in the town of Islip, in the county of Suffolk, being the west end

of the east branch of Fire-island inlet, * * * acquired for the erection of a light-house thereon.

17. In Haverstraw, Rockland county. A tract of land in the town of Haverstraw, in the county of Rockland, being the extreme point of land called Stony-Point, on the Hudson river, * * * acquired for the erection of a light-house or beacon thereon.

18. In Cornwall, Orange county. A certain tract of land in the town of Cornwall, in the county of Orange, * * * containing two hundred and twenty acres or thereabouts.

19. In Lyme, Jefferson county. A certain tract of land in the town of Lyme in the county of Jefferson, being the extreme point of land called Tibbets' point, * * * containing two acres and ninety-six hundredths of an acre of land, acquired for the erection of a light-house thereon.

20. On Plumb island, Suffolk county. A tract of land containing three acres, on the south side of the west end of Plumb island, in the county of Suffolk, * * * acquired for the erection of a light-house thereon.

21. On North Brothers island, Queens county. A tract of land at the western extremity of North Brothers island, in Long Island sound, county of Queens, containing not less than one nor more than five acres, acquired for the erection of a light-house thereon.

22. In Esopus, Ulster county. A tract of land under water in the town of Esopus, Ulster county, at or near the junction of the Roundout and Hudson rivers, not exceeding two acres in area, acquired for the erection of a light-house or beacon light thereon.

23. At Esopus meadows, Ulster county. A tract of land in the town of Esopus, in the county of Ulster, at a place called the Esopus meadows or flats, in the Hudson river, and covered with the waters, * * * acquired for the erection of a light-house thereon.

24. In the city of Buffalo, Erie county. A tract of land in the city of Buffalo on the east side of the Niagara river, * * * acquired for the erection of a light-house or beacon thereon.

25. In the bay of New York. A tract of land, being such portion of the lands under water comprising what is known as West bank, in the lower bay of the port of New York, and Old Orchard shoals, required and occupied by the United States in

the erection thereon of wharves and warehouses for the reception of goods and merchandise arriving in such port in vessels subject to quarantine by the laws of this state.

26. David's island, New Rochelle. A tract of land situate in the harbor of New Rochelle, and known as David's island, acquired by the United States to be used for military purposes.

27. At West Point, Orange county. Certain tracts of land at West Point, Orange county, acquired by the United States prior to May 15, 1875, for the erection and maintenance thereon of forts, arsenals, docks and piers, military academy, hospitals and other needful buildings, and for the maintenance of the national cemetery and an observatory.

28. For aids to navigation on Old Orchard shoal. For the purpose of establishing thereon lights or other aids to navigation on Old Orchard shoal; a tract of land under water inclosed by a circle of two hundred feet in diameter, the center of which shall be located as follows: the angle included between the ranges to Romer light and Sandy Hook light shall be thirty-five degrees and four minutes, the angle between the ranges to Sandy Hook light and Waackaack beacon shall be seventy-nine degrees and two minutes.

29. For fish preserve, Cape Vincent. All that tract or parcel of land, situate in the village and town of Cape Vincent, county of Jefferson, * * * being all the land, buildings, appurtenances, privileges, water rights, docks and cribs lying northerly of said Broadway and between the easterly and westerly boundary lines hereinbefore given, extended to include all water lot frontage, rights, privileges and erections upon, along, or in front of said one hundred and ten feet; also the already well-defined roadway leading from Murray street to the said mill lot hereinbefore bounded and described, subject, nevertheless, to the right of way thereon to and from the wharf lying westerly of said mill to persons doing business at said wharf.

§ 23. *Authorization of acquisition and cession of jurisdiction thereupon, with reservation of right to serve process.* The United States has been authorized to acquire the following tracts or parcels of land, * * *:

1. At Bluff point, Staten Island. A tract at Bluff point, Staten Island, for the erection of fortifications thereon.

2. On Staten Island. Certain lands on Staten Island belonging to the state of New York and used for military purposes, prior to February 6, 1836, required by the United States for the construction and maintenance of proper defenses for the protection of the harbor of New York, and which the commissioners of the land office have been authorized to convey accordingly.

3. At Black Rock, Erie county. A tract or tracts of land in the south village of Black Rock, at or near Buffalo, being so much of blocks Nos. 167, 168 and 186, in such village, required for the site of barracks and defensive works.

4. At sundry places for light-house purposes. Certain tracts of land, and land under water, for the construction and maintenance of light-houses, beacon lights and keepers' dwellings:

For a beacon or range light on Staten Island, in the rear of the Elm Tree beacon, to serve as a range for the Swash channel.

For a light-house on Point au Roche, on the west side of Lake Champlain.

For three beacons in the Hudson river — one at the south point of the island east of Barren Island; one at the north point of the island opposite and east of Coeyman's bar; and one on the point of the island at the mouth of Schodack channel, and opposite Mall rocks.

For a beacon to be placed on the extreme eastern point of the north fork of Long Island.

For a light-house on or near Carlton head, in the St. Lawrence river.

For a beacon light on south end of Cow or Campbell's island, in the Hudson river, near Castleton.

For a beacon light on Little island, in the Hudson river, near New Baltimore.

For a beacon light at Priming Hook point, east side of Hudson river, north of Hudson city.

For a beacon light west side of Hudson river, between Athens and Catskill.

For a first-class light-house near "Great West bay," Suffolk county, Long Island, New York.

For a beacon light at Lloyd's harbor, Suffolk county, Long Island, New York.

For a light-house at Horton's point, Suffolk county, Long Island, New York.

For a light-house at Race point, Fisher's island, Suffolk county, New York.

For a light-house at or near Windmill point, Lake Champlain, New York.

For a beacon light on "Isle au Motte," Lake Champlain, New York.

For nine beacon lights near Whitehall, Lake Champlain, New York.

On Fisher's island, eastern end of Long Island sound, New York, ten and three-tenths acres, more or less. On Barber's point, Lake Champlain, New York, nine acres, more or less. On Bluff point, Valcour island, Lake Champlain, New York, two acres, more or less. On the west bank of Oak Orchard creek, near its mouth, in Orleans county, purchased from Abram V. Clark of the same county, one-half acre, more or less; and at Fair Haven, Cayuga county, New York, five acres or less.

For a light-house on North Brother island or vicinity, East river, New York.

For a light-house on Hart island or vicinity, western end of Long Island sound, New York.

For a light-house at or near Crown Point, Lake Champlain, New York.

For a light-house site and keeper's dwelling on Cumberland head, in the county of Clinton, not exceeding ten acres, adjoining the site occupied by a light-house in 1872.

For a light-house and other light-house purposes on Lake Ontario, in the town of Somerset, county of Niagara.

For light-houses on the Hudson river, at Tarrytown, Livingston creek and in Persey's reach, between Catskill and Hudson.

5. At Suspension Bridge. A tract of land in the village of Niagara city, * * * for the purpose of a custom-house and post-office.

6. At Oswego. A tract of land in the city of Oswego, * * *

for the purpose of erecting, repairing and maintaining a pier for the protection of the harbor of Oswego.

7. At Oswego. A tract of land in the north end of blocks four and five, of military lot number five, in the first ward of the city of Oswego, * * * containing, exclusive of the land under water, 1.201 acres of land, for occupation for the storage of materials, and as sites for offices and storehouses, for the purpose of erecting, repairing and maintaining a pier, for the formation of a harbor at Oswego.

8. At West Point, Orange county. A tract or tracts of land constituting, on May 15, 1888, the whole or a part of the estate of E. V. Kinsley, deceased, and to the south of and adjoining the government lands at West Point, Orange county, for the erection and maintenance of forts, magazines, arsenals, dockyards, military academy, hospitals and other needful buildings.

9. Round pond, Orange county. A tract of land and land under water known as Round pond, in the town of Highlands, Orange county, and certain lands adjacent thereto amounting in all to 49.72 acres, for increasing the water supply of West Point; and any minerals, mineral right, or right appertaining to such mineral right, in such pond, and the lands adjacent thereto, owned by the United States, and in lands through which the right of laying a water pipe from such pond to the lands of the United States at West Point, was granted prior to January 1, 1881.

10. At Whitehall narrows, Lake Champlain. A tract of land under water in Whitehall narrows, Lake Champlain, at a point on the westerly edge of the channel opposite Devil's Pulpit, so called, in the town of Dresden, Washington county, * * * for the purpose of erecting a light-house thereon, and which the commissioners of the land office have been authorized to convey accordingly.

11. At Whitestone point, Queens county. A tract of land twenty-five feet square, situate on the north end of Whitestone point, Queens county, for the purpose of establishing and maintaining lights or other aids to navigation thereon.

12. On Riker's island, East river. A tract of land of the area of a circle of twenty-five feet in diameter, on the northwest point

of Riker's island, East river, for the purpose of establishing and maintaining lights or other aids to navigation thereon.

13. At Spuyten Duyvil. Certain tracts of land, or land under water, necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of a channel, from the North river to the East river, through the Harlem kills.

14. In the city of New York. A certain tract or tracts of land in the city of New York, being such parts of the City Hall park as have been conveyed to the United States by the mayor, aldermen and commonalty of the city of New York; except such part of such land as may have been reconveyed by the United States to the mayor, aldermen and commonalty of the city of New York.

15. In the city of Kingston for the purpose of a federal building * * * land * * * on * * * Broadway where said northerly line of Broadway is intersected by the easterly line of Grand street, * * * containing about fifteen thousand one hundred square feet.

16. In the city of New York. The block of land bounded by Bowling Green, Whitehall, Bridge and State streets, for a site for a custom-house.

§ 24. *Cession during ownership by the United States, with reservation of right to serve process.* Title and jurisdiction to the following tracts or parcels of land have been ceded to the United States by this state, on specified conditions * * *:

1. At West Point. A tract of land under water * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, batteries and other needful military structures and appurtenances. Certain lands in the county of Orange, adjacent or contiguous to the military reservation at West Point, heretofore purchased by the United States, for the erection and maintenance thereon of forts, magazines, military academy, hospitals, docks, piers, and other needful buildings and for other military purposes of the United States Military Academy; and any roadways thereon not public highways across said reservation and also land under water of Hudson river adjacent to and lying in front of said purchased lands, for a distance toward the middle of said river not less than fifty and not more than one hundred feet from high water mark on said lands, for the erection of

wharves and docks and for other military purposes of the United States.

2. At Governor's island. A tract of land under water contiguous to the lands of the United States at Governor's island, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

3. At Bedloe's island. A tract of land under water contiguous to the lands of the United States at Bedloe's island, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

4. At Ellis's island. A tract of land under water contiguous to the lands of the United States at Ellis's island, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

5. At David's island. A tract of land under water contiguous to the lands of the United States at David's island, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

6. At Fort Lafayette. A tract of land under water contiguous to the lands of the United States at Fort Lafayette, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

7. At Fort Hamilton. A tract of land under water contiguous to the lands of the United States at Fort Hamilton, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

8. At Fort Wadsworth. A tract of land under water contiguous to the lands of the United States at Fort Wadsworth (or Tompkins) * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

9. At Fort Schuyler. A tract of land under water contiguous

to the lands of the United States at Fort Schuyler, * * * acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

§ 25. *Authorization of acquisition, and cession of jurisdiction thereupon during ownership by the United States, with reservation of right to serve process.* The United States has been authorized to acquire the following tracts or parcels of land, and jurisdiction thereof has been ceded to the United States, upon such acquisition, on specified conditions * * *.

1. At sundry places for fortifications. Certain tracts of land in or near Buffalo, at or near the mouth of the Genesee river, at or near Sackett's Harbor; and certain islands in the St. Lawrence river, between St. Regis and the Thousand Islands, for the sites of fortifications or defensive works.

2. In the city of Buffalo. A tract or tracts of land in the city of Buffalo, not exceeding (in the whole) one acre, for the purpose of erecting a custom-house, warehouse, court-rooms, post-office, or for either or any of such purposes, and for steamboat inspectors.

3. In the city of Buffalo. A tract of land in the city of Buffalo, not exceeding one acre, for the purpose of erecting a government building thereon.

4. In Sackett's Harbor. A tract of land in the village of Sackett's Harbor, in the county of Jefferson, * * * containing about three acres of land more or less, for the purpose of erecting and maintaining thereon fortifications, defensive works or buildings for officers' quarters, and other necessary government purposes.

5. Islands in the St. Lawrence river. Certain islands, or parts thereof, in the St. Lawrence river, for sites for beacon lights and other necessary government purposes.

6. North Dumplin island. A tract of land in Long Island sound, called the North Dumplin or Hammock, containing about one acre, for the purpose of erecting a light-house thereon.

7. In the city of Oswego. A tract or tracts of land in the city of Oswego, not (in the whole) exceeding one acre, for the purpose of erecting a custom-house, warehouse, post-office and court-room thereon.

8. In the village of Plattsburgh. A tract or tracts of land in the village of Plattsburgh, not exceeding (in the whole) one acre and a half, for the purpose of erecting a custom-house, warehouse, post-office, and court-rooms, or either of them.

9. In the town of Plattsburgh. A tract or tracts of land in the town of Plattsburgh, Clinton county, not exceeding in all one thousand acres, for military purposes, for use as a parade ground, or for any military purposes connected with the United States military post at Plattsburgh.

10. In the city of Utica. A tract or tracts of land in the city of Utica, not exceeding in all one acre, for the purpose of erecting a building thereon to be used as a post-office and court-house.

11. In the city of Albany. A tract or tracts of land in the city of Albany, not exceeding one acre, for the erection of a government building thereon.

12. In the city of Utica. A tract or tracts of land in the city of Utica, not exceeding one acre, for the erection of a government building thereon.

13. In the city of New York. A tract of land in the city of New York, bounded by Whitehall, Pearl, Moore and Water streets, together with the buildings thereon, formerly known as the Old Produce Exchange.

14. In the city of New York. A tract of land with the buildings and improvements thereon in the city of New York, bounded by Washington, West, Laight and Hubert streets, and occupied on March 16, 1883, by the United States, under lease, for customs purposes.

15. In the city of New York. A tract of land in the city of New York, described as follows: Constituting the triangular piece of land, being that portion of the grounds commonly known as the Battery in the city of New York, lying westwardly of and adjoining the lands belonging to the United States on April 29, 1873, and between such lands and the slip or basin in the said Battery known as the New Whitehall boat slip.

16. At New Brighton, Richmond county. A tract of land at New Brighton, Richmond county, adjoining the light-house depot, as it existed on February 19, 1880, and on the west side thereof, not exceeding two acres, for the purpose of such light-house depot.

17. In the city of Rochester. A tract or tracts of land in the city of Rochester, not exceeding one acre, for the purpose of erecting a government building thereon.

18. In the city of Syracuse. A tract or tracts of land in the city of Syracuse, not exceeding one acre, for the erection of a government building thereon.

19. In the city of Poughkeepsie. A tract or tracts of land in the city of Poughkeepsie, not exceeding one acre, for the erection of a government building thereon.

20. In the city of Troy. A tract or tracts of land in the city of Troy, not exceeding one acre, for the erection of a government building thereon.

21. In the city of Auburn. A tract or tracts of land in the city of Auburn, not exceeding one acre, for the erection of a government building thereon.

22. In the city of Hudson. A tract or tracts of land in the city of Hudson, not exceeding one acre, for the erection of a government building thereon.

23. In the city of Binghamton. A tract or tracts of land in the city of Binghamton, not exceeding one acre, for the erection of a government building thereon.

24. At New Lots, Kings county. A tract of land partly in the town of New Lots, Kings county, and partly in the town of Newtown, Queens county, containing fifteen and thirty-nine one-hundredths acres, for establishing a national cemetery.

25. In the city of Newburgh. A tract or tracts of land in the city of Newburgh, Orange county, for the purpose of erecting and maintaining thereon a public building for the accommodation of the post-office and other government offices.

26. In the city of Watertown. A tract or tracts of land in the city of Watertown not exceeding two acres, for the erection of a government building thereon.

27. At Mt. McGregor, Saratoga county. A tract of land upon Mt. McGregor, in Saratoga county, * * *.

28. On Long Island and Plumb island near Sheepshead bay. One or more pieces of land, measuring in the aggregate not exceeding sixty acres, situate adjacent to and on the east side of

the present military post of the United States at Fort Hamilton, Gravesend bay, New York, * * *.

A piece of land on Plumb island near the eastern border of Sheepshead bay, New York, measuring fifty acres, more or less, taken from the eastern end of said island, * * * containing fifty acres, more or less. Upon the said lands so acquired near Fort Hamilton, and upon Plumb island, the United States may erect fortifications, barracks, wharves, and other structures for the defense of the southern or main entrance to New York harbor.

29. Town of Southfield, Richmond county, for fortification purposes. Two parcels of land, containing in the aggregate about six and one-half acres, situate, lying and being adjacent to each other, near to and southwest from the military post of Fort Wadsworth, on Staten Island, in the town of Southfield, county of Richmond, * * *.

30. Adjacent to Fort Wadsworth. All those certain tracts or parcels of land, situate, lying and being in the village of Edgewater, in the town of Southfield, in the county of Richmond, and state of New York, adjacent to the military reservation of Fort Wadsworth, on Staten Island, as follows, to wit: One certain tract of land, containing about fourteen acres, and the land and land under water lying in front thereof, and between ordinary high-water mark of New York bay and the pier and bulkhead line established by the United States, and four certain adjacent tracts of land, containing in the aggregate about eighty-two acres, and about four and eight hundred and fifty-five one-thousandths acres of land and land under water, lying in front of that portion thereof that borders on the shore of New York bay, and between ordinary high-water mark of said New York bay and the pier and bulkhead line established by the United States; and the United States may erect fortifications, barracks and other public buildings thereupon, for the defense of New York harbor.

31. On Ward's island, East river, New York county, for light-houses and fog signal station. All that certain piece or parcel of land situated on Negro point, south part of Ward's island, Hell Gate, East river, in the city of New York, * * *.

32. In the city of Buffalo, site for marine hospital. A tract of land in the city of Buffalo, or in the county of Erie within ten

miles of the boundaries of such city, to be used as a site for a marine hospital.

33. Esopus island in Hudson river, Dutchess county. All the southerly part of Esopus island beginning at the southerly extremity and extending northerly to an east and west line across the neck of land connecting the two main portions of the island at its narrowest point at high-water, and the land shall be used only for the purpose of erecting thereon a light-house, beacons, light-house keepers' dwelling and works for improving navigation.

34. Lands under water in New York harbor. * * *.

35. Lands under water in New York harbor. * * *.

36. Water supply at West Point. Any lands or water, or any rights or easements in lands or water in the town of Highlands, county of Orange and state of New York, at or adjacent to Popolopen creek in said county deemed necessary for the purpose of increasing the water supply for domestic and other uses to and for the government reservation and military academy at West Point, New York, and consent is also given to the acquisition by the United States of America of lands and water and rights in lands and water needed for the erection of any buildings or structures necessary to carry out such purposes and for the construction and maintenance of a pipe line or other conduits adequate to carry such water supply from the reservoirs erected or to be erected by the United States of America, upon the lands acquired by it for the purposes aforesaid to the said United States reservation at West Point, New York.

37. Constitution island, Putnam county. All that tract of land lying east of the easterly bank of the Hudson river and west of the westerly line or side of the New York Central and Hudson River railroad company's land situate in the county of Putnam and state of New York, and formerly known as East Point, and now commonly known as Constitution island, lying opposite to the West Point military reservation.

38. In county of Rockland. * * * And also all lands, docks, piers, bulkheads and buildings; water and lands under water; rights of navigation and dockage and riparian rights; and all rights, titles and forfeitures of, in or to the same; per-

taining to said tract, or in front of, or between the same and the center of the Hudson river.

And it is hereby provided that the United States may hold and use said tract or any part thereof for the purpose of preserving, securing and employing the same for military, naval and other purposes, as may be required, the same to be applied from time to time to such of said purposes as may be designated; and the United States may erect fortifications and other public buildings and lay out and maintain roads, drill grounds and other open spaces thereon, and build docks, piers, bulkheads and wharves and do any and all things necessary or convenient for the purposes aforesaid.

39. In Queens county, for range lights for entering Cold Spring harbor. Two sites not exceeding five acres each for the establishment of range lights for entering Cold Spring harbor, Queens county.

§ 26. *Cession during ownership by the United States and use for public purposes, with reservation of right to serve process.* Title and jurisdiction to the following tracts or parcels of land have been ceded to the United States by this state, upon specified conditions * * * :

1. In Cold Spring harbor, Queens county. A tract of land under water in Cold Spring harbor, Queens county, comprised within a circle two hundred feet in diameter, or less than one acre of surface, acquired for a site for a light-house at the middle ground in said harbor.

2. On Staten Island. A tract or tracts of land on Staten Island, being such portions of the Marine Hospital grounds as have been conveyed to the United States by the commissioners of the land office for light-house and other purposes.

3. At sundry places for light-house purposes. Certain tracts of land, and land under water, from time to time deeded to the United States, and occupied for the construction and maintenance of light-houses and keepers' dwellings, sketches and descriptions of which were filed in the office of the secretary of the state, on or before April 20, 1874, as follows:

No. 1. Split Rock, Lake Champlain, Essex county, New York,

containing five acres, two quarters and six perches, conveyed to the United States by deed dated the fifteenth day of July, 1837.

No. 2. Stuyvesant, county of Columbia, New York, containing five acres, conveyed to the United States by deed dated August thirteenth, 1828.

No. 3. Coxsackie, county of Greene, New York, containing five acres, conveyed to the United States by deed dated the third day of August, 1828.

No. 4. Four Mile Point, town of Coxsackie, county of Greene, New York, containing two acres, two roods and twenty-five rods, conveyed to the United States by deed dated the twelfth day of February, 1831.

No. 5. Cedar-Island light, Gardiner's bay, town of Easthampton, county of Suffolk, New York, conveyed to the United States by deed dated the twentieth of August, 1838.

Also, the lands lying under water, and known as submarine sites, sketches and maps of which, by metes and bounds, have been furnished by the United States and were filed in the office of the secretary of state, on the twentieth day of April, 1874, viz.:

No. 6. Hart's Island, situated in Long Island sound, Westchester county, New York, at the south end of Hart island, under water and beyond low water mark, containing three acres and seventy-five hundredths of an acre.

No. 7. Execution Rocks, Long Island sound, one hundred feet in diameter, containing less than an acre, situated seven-eighths of one mile north of Sands Point light, and five miles to the north-east of Fort Schuyler.

No. 8. Robin's Reef, New York harbor, containing an area of less than one acre.

No. 9. Long-beach bar, entrance to Greenport harbor, Long Island, Suffolk county, New York, containing an area of less than one acre.

No. 10. Stratford shoal, Long Island sound, New York, containing an area of less than one acre.

No. 11. Race Rock, off Fisher's Island point, at the western entrance to Fisher's Island sound, Suffolk county, New York, containing an area of less than one acre.

No. 12. Hudson city, middle ground, Hudson river, opposite

the city of Hudson, county of Columbia, New York, containing an area of less than one acre.

No. 13. Saugerties, on the mud flat on the north side of entrance to Saugerties creek, county of Ulster, New York, containing an area of less than one acre.

No. 14. Roah Hook, on the west side of the Hudson river, behind the angle of the dyke, south of Roah Hook, New York, containing an area of less than one acre.

No. 15. Parada Hook, on a point of rocks, lower end of dyke, on west side of the Hudson river, New York, containing an area of less than one acre.

No. 16. Nine-mile tree, Castleton, behind the center of dyke, on the east side of the Hudson River, New York, containing an area of less than one acre.

No. 17. Cross-over dyke, on north end of stone dyke below Albany, on the west side of the Hudson river, New York, containing an area of less than one acre.

No. 18. Cuylers' dyke, on the east side of the Hudson river, on the lower or south end of dyke, near Albany, New York, containing an area of less than one acre.

No. 19. Van Wie's point, on the south end of the stone dykes below Albany, New York, on the west side of the Hudson river, containing an area of less than one acre.

No. 20. Potter's or Sea-flower reef, Fisher's Island sound, Suffolk county, New York, about one and a half miles north of Fisher's island, containing an area of less than one acre.

No. 21. Sand spit entrance to Sag Harbor, Suffolk county, Long Island sound, New York, containing an area of less than one acre.

No. 22. Branford reef, abreast of Branford harbor, Long Island sound, New York, containing an area of less than one acre.

No. 23. Romer shoal, off Sandy Hook, entrance to New York harbor, containing an area of less than one acre.

No. 24. Oyster Point, Plumb Gut entrance to Gardiner's bay, Long Island sound, Suffolk county, New York, containing an area of less than one acre.

No. 25. The Stepping Stones, about one mile south of Hart

island, Long Island sound, New York, containing an area of less than one acre.

No. 26. Mill reef, opposite New Brighton, in the Kill von Kull, Richmond county, New York, containing an area of less than one acre.

§ 27. *Authorization of acquisition by the United States, and cession of jurisdiction thereupon during ownership by the United States and use for public purposes, with reservation of right to serve process.* The United has been authorized to acquire the following tracts or parcels of land, and jurisdiction thereof has been ceded to the United States upon such acquisition, on specified conditions * * *.

1. In the city of New York. A tract of land in the city of New York, fronting on Wall street, and occupied on February 7, 1857, by the United States as an assay office; and also the property north of the same, fronting on Pine street, and also the property adjoining said Pine street property on the east, and occupied by the United States, for revenue purposes, on February 7, 1857, as offices for the surveyor for the port of New York, and also that piece or parcel of land bounded by Park row, Beekman and Nassau streets, for the purpose of a post-office.

2. In the city of New York. A tract or tracts of land in the city of New York, and not exceeding in area fifty thousand square feet, for a site for a post-office.

3. In the city of New York. A tract of land in the city of New York, situated in the first ward of the city of New York, and constituting the entire square formed by Wall, William and Hanover streets, and Exchange place, and the Exchange building and improvements erected thereon, covering the whole of said square, for the purpose of a custom-house.

4. In the city of New York. A tract of land in the city of New York, being so much of land belonging to the corporation of such city, and immediately adjoining the northerly side or boundary of the land conveyed to the United States prior to January 1, 1879, by the mayor, aldermen and commonalty of the city of New York, for a site for a post-office, as is now covered by two sidewalks, each 103 feet and six inches in length, by nineteen feet two inches in width, with a paved passage-way be-

tween eleven feet and eleven inches in width, making a total area of 218 feet and eleven inches in length by nineteen feet and two inches in width.

5. In the city of New York. A tract or tracts of land in the city of New York, not exceeding in area two hundred thousand square feet, for the purpose of an appraiser's warehouse and other purposes.

6. In the city of Brooklyn. Certain tracts of lands in the city of Brooklyn described as follows: Six lots of land with the warehouses thereon erected, in the sixth ward of the city of Brooklyn, on the south pier of the property of the Atlantic Dock Company, known as lots Nos. 53, 54, 55, 56, 57 and 58, on the said south pier of the Atlantic Dock Company, on a certain map inscribed "map of property in the sixth ward of the city of Brooklyn, port of New York, belonging to the Atlantic Dock Company, surveyed September, eighteen hundred and forty-one, by Willard Day city surveyor," said lots each being twenty-five feet front and rear, and one hundred feet deep on each side, for revenue purposes.

7. In the city of Brooklyn. A tract or tracts of land in the city of Brooklyn, for a site for a post-office.

8. At Hallett's point, Queens county. A tract or tracts of land at Hallett's point, Hell Gate, in Queens county, * * * for the purpose of establishing thereon light-houses or other aids to navigation.

9. At Coney Island, Kings county. Two certain tracts of land at Coney Island, Kings county, * * * for the purpose of erecting thereon light-houses and fog signals.

10. At Staten Island, Richmond county. A tract of land at Staten Island, Richmond county, * * * for the purpose of erecting a light-house thereon.

11. West Troy, Albany county. Two certain tracts of land at West Troy, town of Watervliet, Albany county, * * *.

12. In the city of New York as a site for a marine hospital.
* * *

13. Hart's Island, Long Island sound. All that piece or parcel of land at Hart's Island, in Westchester county, * * *.

§ 28. *Cession during use for purpose thereof, with reservation*

of right to serve process. Title and jurisdiction to the following tracts or parcels of land have been ceded to the United States by the state, on specified conditions. * * *

1. In the city of New York. A tract or tracts of land, and land under water in the city of New York, not exceeding two hundred and fifty feet, being a portion of the eastern end or extremity of the lands and lands under water, formerly known as the Battery extension, including the open slip or basin at the easterly end thereof, together with a right of way or passage not less than seventy-five feet in width, from such lands over and across the lands adjacent thereto, known as the Battery ground, which the mayor, aldermen and commonalty of the city of New York have been authorized to convey to the United States, acquired for the purpose of erecting and establishing a barge office and other suitable buildings and structures for the transaction of the public business connected with the United States revenue service, and for the landing of revenue and other government boats and barges, for the use, accommodation and convenience of the United States custom-house for the port of New York, the title of this state in which the commissioners of the land office have been directed to convey.

2. In Kings county. Two certain tracts of land in Kings county, * * *. These cessions were made for the purpose of erecting and maintaining a navy hospital and other necessary edifices and buildings.

3. At Prince's bay, Richmond county. A tract containing about eight acres and three-quarters of an acre of land, situated at Prince's bay, in the town of Westfield and county of Richmond, * * * acquired for the purpose of erecting a light-house thereon.

4. On Staten Island. A tract of land not exceeding one acre in extent, on the lands belonging to the state, on and near the southeastern point or projection of Staten Island; to be laid out in such a manner as not to interfere with the appropriate uses of the military grounds of Fort Tompkins; acquired for the purpose of erecting a light-house thereon.

5. In Raritan bay. A tract of land under water in Raritan

bay, * * * acquired for the purpose of erecting a light-house thereon.

6. In Fisher's Island sound. A tract of land under water in Fisher's Island sound, * * * acquired for the purpose of erecting a light-house thereon.

7. At Gardiner's island, Suffolk county. A tract of land on Gardiner's island, Suffolk county, * * * containing about fourteen acres more or less, acquired for the purpose of erecting and maintaining thereon a light-house and other necessary buildings.

8. At Rye, Westchester county. A tract of land in the town of Rye, Westchester county, on Captain's island, * * * acquired for the purpose of erecting and maintaining thereon a light-house and other necessary buildings.

9. At Watervliet, Albany county. A tract of land in the town of Watervliet, Albany county, * * *; but always excepting and reserving out of the lands above described, the land occupied by the Erie canal, one rod on each side thereof, and also the public highway, acquired for the purpose of erecting and maintaining thereon arsenals, magazines, dock yards and other necessary buildings.

10. In towns of Theresa and Antwerp, Jefferson county, for fish hatchery. Such lands and the rights of way thereto in the towns of Theresa and Antwerp, Jefferson county, as said United States may need, require and secure for the purposes of a United States fish hatchery, * * *.

§ 29. *Authorization of acquisition and cession of jurisdiction thereupon, during use for purposes thereof, with reservation of right to serve process.* The United States has been authorized to acquire the following tracts or parcels of land, and jurisdiction thereof has been ceded to the United States upon such acquisition on specified conditions * * *.

1. In the city of Brooklyn. A tract or tracts of land in and adjacent to the city of Brooklyn, * * *. Such acquisition has been authorized for the purpose of a navy yard and naval hospital, * * *.

2. On Staten Island. A tract of land on Staten Island, Richmond county, owned by William H. Aspinwall, lying mainly between the lands of the United States and New York avenue, for

the purpose of building and maintaining forts, magazines, arsenals and other necessary structures.

3. On Long Island. A tract or tracts of land on Long Island, Queens county, in a direction opposite Fort Schuyler, East river (and concurrent jurisdiction over all the shores, flats and waters contiguous to such lands, within 400 feet from low water mark, measured toward the channel, and over the land lying between high and low water marks), for the purpose of building and maintaining forts, magazines, dock-yards, wharves and other necessary structures and appendages.

4. On Long Island and Staten Island. A tract or tracts of land adjacent to Fort Hamilton, Kings county, and adjacent to Fort Tompkins in the town of Southfield, Staten Island, not exceeding 150 acres together with all the shores, flats and waters within 400 yards from low water mark, contiguous to such lands; for the purpose of erecting and maintaining thereon batteries, forts, magazines, wharves and other necessary structures with their appendages.

5. In Hudson river. Certain tracts of land under water in the Hudson river, for the purpose of erecting light-houses, beacon lights, range lights, or other aids to navigation, and light keepers' dwellings, and which the commissioners of the land office have been authorized to convey.

6. At sundry places for light-house purposes. Certain tracts of land in or near the Hudson river, for the purpose of the construction and maintenance of light-houses and keepers' dwellings, as follows:

1. For a beacon light on the eastern shore of the river near the lower end of Fish House bar.

2. For a beacon light on a dike above Fish House bar.

3. For a beacon light on the southern part of an island near Round shore.

7. At Danskamer point, near Orange county. A tract of land not exceeding one acre, situate at Danskamer point, on the western side of the Hudson river, at a point near the northern boundary of Orange county; and also a tract of land not exceeding 25 feet square, situate at the Narrow channel, on the west side of the Hudson river, in Greene county, distant about three-fourths of

a mile due north of the Four-Mile point light-house, for the purpose of establishing and maintaining light-houses, fog signals or other aids to navigation.

8. Near Tarrytown. A tract of land under water in the Hudson river, in the vicinity of Tarrytown point, for the purpose of erecting a beacon light thereon, when the site thereof shall have been selected and approved by the commissioners of the land office and a description thereof filed in the office of the secretary of state.

9. Sister islands, St. Lawrence county. Certain tracts of land in St. Lawrence county, known and designated as the "Sister islands," being two islands situated near the most easterly point of Grenadier island, in Canada, for a site for a light-house and to be acquired by the United States before January 1, 1862.

10. At Ogdensburgh, St. Lawrence county. A tract of land in Ogdensburgh, St. Lawrence county, * * * for the purpose of a custom-house and post-office with court-rooms.

11. At Hounsfield, Jefferson county. A tract of land known as Horse island, in the town of Hounsfield, Jefferson county, for the purpose of erecting and maintaining a light-house and other buildings connected therewith.

12. Near outlet of Lake Champlain. A tract of land near the outlet of Lake Champlain for a site for a fort, and which the commissioners of the land office have been authorized to convey accordingly.

13. Near mouth of Oswego river. A tract of land near the mouth of the Oswego river, Oswego county, known as the old fort, military and parade ground, for the purpose of re-establishing the military post, of rebuilding the fort, redoubts and barracks, of improving the parade grounds, and of the erection of a marine hospital, and which the commissioners of the land office have been authorized to convey accordingly. * * *.

14. In the city of Buffalo. A tract or tracts of land in the city of Buffalo, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings deemed necessary for the protection and defense of such city.

15. In Buffalo. A tract or tracts of land adjacent to, or in the vicinity of, the lands owned by the United States, and occupied

on January 1, 1842, by the light-house in the city of Buffalo; for the purpose of erecting a fort, battery or other military works thereon; and which the commissioners of the land office have been authorized to convey accordingly.

16. At Black Rock, Erie county. Certain tracts of land in the south village of Black Rock, between Lake street or Broadway and the easterly line of the Buffalo and Black Rock railroad, or north of block 133, and between the Erie canal and Black Rock harbor, or lands adjacent thereto, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes; for the purpose of erecting and establishing a fort, battery, barracks, parade ground or military post, and which the commissioners of the land office have been authorized to convey accordingly.

17. At Black Rock and Buffalo. A tract of land in the south village of Black Rock, Erie county, * * * as may be required by the United States of America, and necessary for the purpose of erecting and establishing a fort, battery, barracks, parade ground or military post; * * *.

18. In Sackett's Harbor. Such lands in the village of Sackett's Harbor, county of Jefferson, for the erection of forts, magazines, arsenals, dock yards and other needful buildings as the government of the United States may deem necessary, and on the property owned or to which it has or may acquire title.

§ 30. *Authorization of acquisition and cession of jurisdiction thereupon, with reservations of concurrent jurisdiction and right to serve process.* The United States has been authorized to acquire the following tracts or parcels of land, and jurisdiction thereof has been ceded to the United States upon such acquisition, on specified conditions * * *.

1. At Watervliet, Albany county. A tract of land in the town of Watervliet, Albany county, * * * containing 38 acres and $\frac{7}{10}$ of an acre; but always excepting and reserving out of the lands above described one rod in width along the west side of the Erie canal, for the purpose of erecting and maintaining thereon arsenals, magazines and other necessary buildings.

2. At Watervliet, Albany county. A tract of land in the village of West Troy, town of Watervliet, Albany county,

* * * for the purpose of erecting and maintaining thereon arsenals, magazines and other necessary buildings, and of using the grounds in connection with the arsenal buildings already erected prior to the acquisition thereof.

3. In the city of Buffalo. A tract of land in the city of Buffalo, * * * for the purpose of erecting and maintaining the necessary piers to protect the said canal or channel and a light-house at or near the mouth thereof.

4. In the city of Buffalo. A tract or tracts of land situate in the city of Buffalo, and the town of Black Rock, Erie county; for the purpose of erecting and maintaining a sea wall connecting with the pier on the south side of the Big Buffalo creek, * * *.

§ 31. *Cession during ownership by the United States and use for purposes thereof, with sundry reservations.* Title and jurisdiction to the following tracts or parcels of land has been ceded to the United States upon specified conditions * * *:

1. In the city of New York. A tract of land and land under water, in the city of New York, * * * acquired for the defense and safety of the city of New York.

2. In the city of New York. A tract of land or land under water in the city of New York, * * * acquired for the defense and safety of the city of New York.

3. In East river. A tract of land under water in East river at the Wallabout bay, and adjoining the navy yard of the United States, * * * acquired for the defense and safety of the city of New York.

The free and common use of the waters not appropriated by the United States for wharves or fortifications to the eastward of the navy yard of the United States and the westward of the east boundary line of the land above described, is reserved to the people of this state.

§ 32. *Cession during use for purposes thereof, with sundry reservations.* Title and jurisdiction to the following tract or parcel of land has been ceded to the United States by this state upon specified conditions * * *:

1. At New Utrecht. A tract of land in the town of New Utrecht, Kings county, on the easterly side of the Narrows, at the entrance into the bay of New York, and upon a reef called Hendrick's reef, * * * acquired for the defense and safety of the city of New York.

§ 33. *Cession with sundry reservations.* Title and jurisdiction to the following described tract or parcel of land has been ceded to the United States by this state upon specified conditions * * *.

Town of Greenbush. A tract of land in the town of Greenbush in the manor of Rensselaerwick, county of Rensselaer * * *; acquired for the purpose of erecting magazines, arsenals, barracks and other needful buildings.

§ 34. *Cession during use for purposes thereof, with sundry reservations.* Title and jurisdiction of the following described tracts or parcels of land has been ceded to the United States by this state on specified conditions * * *:

Three separate tracts of land in the county of Oneida, the county of Albany and the county of Clinton, * * *; acquired for the defense and safety of the state.

§ 35. *Cession of jurisdiction to lands acquired for light-house purposes.* * * *

§ 36. *Acquisition by condemnation.* When the United States shall have been authorized by law to acquire title to any real property within this state, such title may be acquired by gift or grant from the owners thereof, or by condemnation if, for any reason, the United States is unable to agree with the owners for the purchase thereof.

ARTICLE 4

Purchase and Acquisition of Land by the United States

Section 50. Consent of state to purchase of land and record of conveyances.

51. Proceedings for acquiring title.

52. Governor may execute deed or release.

53. * * *.

54. * * *.

55. Delivery and filing of deeds and leases.

56. * * *.

57. * * *.

§ 50. *Consent of state to purchase of land and record of conveyances.* The consent of the state of New York is hereby given to the purchase by the government of the United States, and under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate within the boundaries of this state, situate upon or adjacent to the navigable waters thereof, for the purpose of erecting thereon light-houses, beacons, light-house keepers' dwellings, works for improving navigation, post-offices, custom-houses, fortifications, and all deeds, conveyances or other papers relating to the title thereof shall be recorded in the office of the register or county clerk of the county where the said lands are situated.

§ 51. *Proceeding for acquiring title.* Whenever the United States is desirous of purchasing or acquiring the title to any tract, piece or parcel of land within the boundaries of this state for any of the purposes aforesaid, and can not agree with the owner or owners thereof as to the purchase thereof, or if the owners of any of said lands are unknown, infants, of unsound mind, or non-residents, or if for any other reason a perfect title can not be made to said lands, or any part thereof, the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, is authorized to apply to the supreme court of the state, in and for

the county within which the said lands are situated, to have the said lands condemned for the use and benefit of the United States, under the provisions of the statutes of this state applying to condemnation of lands.

§ 52. *Governor may execute deed or release.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of the state of New York, certified copies of the record or transfer to the United States of any tracts or parcels of land within this state, which have been acquired by the United States for any of the purposes aforesaid, together with maps or plats and descriptions of such lands by metes and bounds, and a certificate of the attorney-general of the United States that the United States is in possession of said lands and premises for either of the works or purposes aforesaid, under a clear and complete title, the governor of this state is authorized, if he deems it proper, to execute in duplicate, in the name of the state and under its great seal, a deed or release of the state ceding to the United States the jurisdiction of said tracts or parcels of land as hereinafter provided.

* * * * *

§ 55. *Delivery and filing of deeds and leases.* One of the deeds or leases so executed in duplicate shall be delivered to the duly authorized agent of the United States, and the other deed or release shall be filed and recorded in the office of the secretary of state of the state of New York; and said deed or release shall become valid and effectual only upon such filing and recording in said office.

APPENDIX II-A.

DEEDS OF CESSION TO THE PEOPLE OF THE STATE OF NEW YORK
FOUND IN CANAL BOARD'S SAFE IN COMPTROLLER'S OFFICE.

ERIE CANAL.

Bundle.	Inst. No.	Name.	Date of Form.	Date of Cession.	Location Endorsed.
5	1	Ackley, Samuel.	1816	1816-11-2	
4	17	" Samuel.	1817	1817-8-7	Madison Co.
4	26	Beebe, David.	"	1817-8-27	"
4	15	" Solomon.	"	1817-8-12	"
4	8	Beecher, Sherman.	"	" " 11	"
4	21	" Walter.	"	" 9-8	"
3	4	Bellinger, John.	"	" 7-30	Utica.
1	38	Berry, Daniel.	"	1819-1-1	
2	30	Bettinger, George.	"	1817-8	
2	16	" John.	"	1817-8-29	
2	17	Blake, Homer.	"	1817-9-2	
2	9	" Hector.	"	1817-8-30	
1	32	Bleecker, H. N.	"	1821-5-3	
5	15	Breed, Thomas.	1816	1816-9-11	
3	1	Breese, A.	1817	1817-8-4	(Reserving some Utica lots.)
2	29	Britton, Abraham.	"	1817-8-30	
2	37	Brooks, Gilbert.	"	1817-9-6	
4	22	Brower, Aaron.	"	1817-8-29	Madison Co.
4	22	" Mary.	"	1817-8-29	"
1	29	Buck, Aholiab.	1816	1816-9-16	
5	10	" Elijah, Jr.	"	1816-9-18	
2	1	Burchard, G.	1817	1817-8-4	Utica.
2	13	Burton, Smith.	"	1817-8-29	
4	12	Brown, Timothy.	"	1817-8-13	Madison Co.
2	52	Camp, Israel D.	"	1817-9-5	
3	16	Capron, Seth.	"	1817-7-30	Whitestown.
5	13	Carter, Levi.	1816	1816-9-9	
1	45	Casler, Nicholas.	1817	1819-1-30	
4	16	Clark, Silvester.	"	1817-8-13	Madison Co.
2	32	Clarke, Peter.	"	1817-9-13	
4	19	Covell, Ephraim.	"	1817-8-7	Madison Co.
2	24	Crane, James K.	"	1817-9-13	
4	7	Culver, Elias.	"	1817-8-12	Madison Co.
2	35	Davis, Thomas.	"	1817-8-30	
4	1	Douglass, Zebulon.	"	1817-8-12	Madison Co.
3	8	Dudley, Charles E.	"	1820-9-15	(Herkimer &
3	8	" Islandina.	"	" " "	Oneida Count- ies)

1	36	Earl, Samuel.	1817	1819-1-9	
2	10	Ellis, M.	"	1817-9-3	
5	14	Field, Peter.	1816	1816-9-12	
5	7	Foster, Martin.	"	1816-9-3	
1	37	Frank, John.	1817	1819-1-10	
4	13	French, Alphens.	"	1817-8-13	Madison Co.
3	13	Furgeson, Daniel.	"	1817-8-5	Frankfort
3	12	" James.	"	" " "	Frankfort.
3	3	Gere, William.	"	1817-7-30	Utica.
4	27	Gethart, Henry.	"	1817-8-27	Madison Co.
2	18	Gevy, Mathew.	"	1817-8-29	
1	41	Gillespie, T. B.	"	1819-1-30	
5	6	Goes, Mathew.	1816	1816-8-12	
3	14	Hamilton, Elizabeth.	Special.	1817-10-4	Utica & Frankfort. (Mentions Coshy's Manor)
2	54	Hamilton, James.	1817	1817-9-13	
3	19	Hart, Ephraim.	"	1817-7-30	Utica.
2	21	Harter, Conrad.	"	1817-8-30	
2	59	Higby, Seth.	"	1817-9-13	
2	39	Higley, Samuel H.	"	1817-9-13	
2	8	Hinsdale, David, Jr.	"	1817-9-3	
4	30	Holladay, Samuel.	"	1817-9-9	Madison Co.
2	12	Hopkins, Nathan.	"	1817-9-3	
2	19	Hovey, Alfred.	"	1817-9-13	
3	17	Hunt, Montgomery.	"	1817-7-30	Utica, except 1 lot.
2	51	" Walter.	"	1817-9-3	
2	4	Huntley, Adam S.	"	1817-8-30	
2	36	" Ira.	"	1817-8-31	
4	29	Jansen, Gerd.	"	1817-9-8	Madison Co.
2	15	Kellogg, Aaron.	"	1817-9-6	
2	50	" Henry.	"	1817-9-1	
2	14	" Paul.	"	1817-8-30	
3	18	Kenning, G.	"	1817-8-7	Oneida Reservation.
4	24	Kennier, Henry.	"	1817-8-27	Madison Co.
3	2	Lee, Joseph M.	"	1817-8-22	Madison Co.
4	23	" Sherebiah.	"	1817-8-22	"
4	20	Lewis, Nathan.	"	" " 7	"
5	3	Lincoln, Leonard.	1816	1816-8-12	
2	58	Low, Peter.	1817	1817-9-3	
3	10	Lynch, Dom.	"	1816-8-21	"ubicumque."
5	9	McLoud, Lewis.	1816	1816-9-19	
2	41	McMullen, Hugh.	1817	1817-9-5	
2	38	McQueen, Daniel.	"	1817-9-3	
1	2	Miller, M. J.	"	1820-9-15	(Oneida & Herkimer.)

1	35	Morgan, A.	1817	1819-1-9	
1	34	" D.	"	1819-1-9	
2	31	Munro, David.	"	1817-9-17	
3	7	" Peter Jay.	1816	1816-8-21	" ubicumque."
1	39	Meyers, Henry.	1817	1819-1-1	
2	20	Olcott, James.	"	1817-9-2	
4	5	" J., Jr.	"	1817-8-11	Madison Co.
4	9	Olds, Ira M.	"	1817-8-12	"
2	6	Palmer, Charles.	"	1817-8-30	
2	42	" Sanford.	"	1817-9-1	
2	33	Peck, Enos, Jr.	"	1817-9-3	
4	4	Perkins, Reuben.	"	1817-8-13	Madison Co.
2	40	Pickard, Joseph.	"	1817-9-5	
5	5	Pool, Peter.	1816	1816-8-13	
4	28	Powers, Jason W.	1817	1817-9-9	Madison Co.
5	8	" Samuel.	1816	1816-9-10	
2	3	Raymond, Ebenezer.	1817	1817-8-30	
2	23	" John.	"	1817-8-30	
2	43	Rayner, James, Jr.	"	1817-9-6	
5	12	Redfield, James W.	1816	1816-9-10	
2	28	Roberts, John L.	1817	1817-8-30	
1	33	Ropf, John	"	1821-5-3	
1	40	Shoemaker, Rudolph I.	"	1819-1-9	
1	43	" Robert.	"	1819-1-9	
4	3	Smalley, Sylvanus.	"	1817-8-13	Madison Co.
2	44	Smith, Aaron.	"	1817-9-5	
4	6	" Peter.	"	1817-10-14	Madison Co. (except land sold on contract.)
2	25	" Samuel B.	"	1817-9-6	
2	34	Springsteed, Jacot.	"	1817-9-3	
2	60	Squire, Linus.	"	1817-9-3	
1	44	Staring, Henrick.	"	1819-1	
1	42	Steel, Nicholas.	"	1819-1-30	
4	14	Stone, Adam.	"	1817-8-13	Madison Co.
4	11	Storms, John.	"	" " "	"
2	46	Sweeting, Lewis.	"	1817-9-2	
2	11	Tuttle, James.	"	1817-	
3	9	Tallmadge, Eliza.	Special.	1817-11-18	(Oriskany & Fonda's Patent)
3	9	" M. B.	"	1817-11-18	" "
2	56	Thompson, William.	1817	1817-9-5	
2	22	Tilden, Simon.	"	1817-9-13	
4	18	Towns, Stephen.	"	1817-9-9	Madison Co.
2	5	Turner, Zebedee.	"	1817-9-6	
2	45	Tyler, Comfort.	"	1817-9-13	
3	6	Van Rensselaer, Jerem.	"	1817-7-30	Utica.
3	15	Van Sanvoort, Abraham	"	1817-8-4	Utica.
2	47	Van Velzer, John.	"	1817-8-31	

Bundle.	Inst. No.	Name.	Date of Form.	Date of Cession.	Location Endorsed.
4	10	Webb, John P.	1817	1817-8-13	Madison Co.
		White, ———	"	1817-	
2	49	" Aaron.	"	1817-9-3	
2	48	" Jonathan.	"	1817-9-3	
2	55	Whitmore, Benjamin.	"	1817-9-13	
5	2	Wiles, Daniel.	1816	1816-8-12	
2	2	Willcox, David.	1817	1817-8-	
2	27	Williams, John.	"	1817-8-26	
3	5	" N.	"	1817-7-30	Utica.
2	57	" Willia.	"	1817-8-29	
2	53	Wilson, George.	"	1817-9-13	
2	53	" Margaret.	"	1817-9-13	
5	4	Wolaver, Nicholas.	1816	1816-8-12	
3	11	Wolcott, Solomon.	1817	1817-8-5	(Reserving cer- tain Utica rights.)
2	26	Wooster, Isaac.	"	1817-8-27	
2	7	Worden, Jonathan.	"	1817-9-1	
5	11	Young, James.	1816	1816-9-15	
4	25	Yule, Joseph.	1817	1817-8-11	Madison Co.
1	31	Schermerhorn, John L. <i>et al.</i>	"	1821-5-10	Schenectady.
1	46	Vrooman, Adam S. <i>et al.</i>	"	1821-6-7	Schenectady.

DEEDS OF CESSION TO THE PEOPLE OF THE STATE OF NEW YORK
FOUND IN CANAL BOARD'S SAFE IN COMPTROLLER'S OFFICE.

CHAMPLAIN CANAL.

Bundle.	Inst. No.	Name.	Date of Form.	Date of Cession.	Location Endorsed.
1	6	Adenis, Jeremiah.	1817	1817-10-15	None.
1	10	Anderson, Andrew.	"	1817-10-19	"
1	13	Atwood, Samuel.	"	1817-10-17	"
1	4	Baker, Chas.	"	1817-10-11	"
1	23	Boyce, Abraham.	"	1817-10-14	"
1	25	Baker, John.	"	1817-10-11	"
1	11	Coleman, Brewster.	"	1817-10-13	"
1	12	Clark, Geo.	"	1817-10-21	"
1	26	Cook, Daniel.	"	1817-10-13	"
1	27	Campbell, Joseph.	"	1817-10-13	"
1	20	Dings, John.	"	1817-10-11	"
1	1	Eddy, Timothy.	"	1817-10-11	"
1	17	Elliott, Cady.	"	1817-10-13	"
1	19	Eddy, Asa.	"	1817-10-11	"
1	18	Finn, William.	"	1817-10-11	"
4	2	Force, Freeman.	"	1817-10-13	"
1	10	Goodrich, Asa.	"	1817-10-19	"

Bundle.	Inst. No.	Name.	Date of Form.	Date of Cession.	Location Endorsed.
1	6	Hall, Nathaniel.	1817	1817-10-15	None.
1	9	High, Nathan.	"	1817-10-11	"
1	15	Hicks, William.	"	1817-10-13	"
1	14	Kneeland, Ichabod.	"	1817-10-13	"
1	8	Lawrence, John.	"	1817-10-11	"
1	28	Levy, Moses.	"	1817-10-15	"
1	5	Moore, Phineas.	"	1817-10-11	"
1	7	Mitchell, Rosel.	"	1817-10-11	"
1	12	Moore, William A.	"	1817-10-21	"
1	12	McCroken, Chas.	"	1817-10-21	"
1	21	Miller, John.	"	1817-10-13	"
1	24	Pitcher, Nathaniel.	"	1817-10-11	"
1	28	Parke, John.	"	1817-10-15	"
1	28	Renning, Stephen.	"	1817-10-15	"
1	30	Rood, Chas.	"	1817-10-13	"
1	16	Sherwood, Adiel.	"	1817-10-13	"
1	22	Thomas, John.	"	1817-10-11	"
1	3	White, John.	"	1817-10-17	"
1	6	Wheeler, Milancton.	"	1817-10-15	"
1	6	Wiswell, Amos.	"	1817-10-15	"

RELEASES TO THE STATE BY THE OWNERS OF HYDRAULIC WORKS
ON THE ROUTE OF THE CROOKED LAKE CANAL, FOUND IN THE
CANAL BOARD'S SAFE IN THE COMPTROLLER'S OFFICE.

Bundle.	Inst. No.	Name.	Date of Form.	Date of Cession.	Location Endorsed.
6	1	Andrews, Jeremiah.	1829	1830-8-17	Yates Co.
6	6	Brownell, William.	"	1829-12-28	"
6	8	Babcock, William.	"	1829-12-14	"
6	12	Beekman, Henry.	"	1830-1-25	"
6	13	Bogert, H. H. & el.	"	1830-8-17	"
6	14	Beekman, Henry.	"	1830-5-27	"
6	18	Brownell, William.	"	1830-5-27	"
6	10	Henderson, Richard.	"	1829-12-12	"
6	3	Jillett, Jeremiah.	"	1830-5-27	"
6	20	Jillett, Jeremiah.	"		
6	4	Lawrence, Samuel.	"	1830-5-27	"
6	9	Lawrence, John, Jr.	"	1830-2-4	"
6	15	Lawrence, Samuel.	"	1829-12-12	"
6	11	Mallory, M.	"	1829-9-3	"
6	5	Sherman, Geo.	"	1830-5-27	"
6	7	Sheppard, Morris F.	"	1830-5-29	"
6	16	Sheppard, M. F.	"	1829-10-1	"
6	17	Shearman, Geo.	"	1829-8-27	"
6	1	Way, William.	"	1830-8-17	"
6	2	Wagener, Abraham.	"	1830-5-31	"
6	19	Wagener, Abraham.			

APPENDIX III.

RECOMMENDED BY

.....
.....

STATE OF NEW YORK

OFFICE OF SUPERINTENDENT OF PUBLIC WORKS

REVOCABLE PERMIT

ALBANY,.....19....

WHEREAS,.....
 a corporation duly formed and organized under and by virtue of
 the Laws of this State, has made application for permission to

.....

and has filed in this office maps, plans and profile, showing the
 state land at the location referred to and the details of the work
 proposed to be done.

THEREFORE, permission is hereby granted to said.....

.....

as asked for in said application, and described above, at its own
 cost and expense, upon the following conditions and restrictions:

1st. This permit shall not be assigned or transferred without
 the written permission of the Superintendent of Public Works.

2nd. No work shall be commenced under this permit until such
 time as an Inspector, appointed by the Superintendent of Public
 Works, shall be present; and in case of any violation of this pro-
 vision this permit is void and shall be without force or effect.

3rd. All work authorized by this permit shall be done in accordance with the maps, plans and profile now on file in this office, and in accordance with the special and general conditions hereinafter contained.

4th. All work authorized by this permit shall be done under the supervision of the Superintendent of Public Works, or Inspector to be appointed by him, and the salary of said inspector together with all necessary expenses of inspection, shall be paid by said. and the work shall be done at such times as the Superintendent of Public Works shall direct, and so as not to interfere with the free and perfect use of the canals, or endanger the lives or property of any persons, and particularly of those engaged in repairing, operating or navigating the canal.

5th. In the event that any vessel or float is subjected to delay by reason of the work authorized by this permit, said. shall pay to the owner of such vessel or float so delayed, such amount as will fairly compensate such owner for the delay or loss of time occasioned to him by the operations herein authorized; and in the event that the said. and the said owner are unable to agree as to the amount of compensation to be paid for such delay, the amount of such payment shall be determined by the Superintendent of Public Works, and the sum fixed by him shall be and become binding upon said. and shall be paid by. to such owner. The inspector appointed by the Superintendent of Public Works pursuant to the fourth paragraph of this permit, shall ascertain whether or not any boats have been delayed by the work herein authorized, and shall determine the extent of the damages suffered, and shall report such facts to the Superintendent of Public Works for his final determination.

6th. Any and all canal banks or other structures which may be disturbed or interfered with during the progress of the work, shall be restored to a perfect condition by said. , at. own cost and expense.

SPECIAL SPECIFICATIONS AND CONDITIONS:—


7th. Said shall be deemed and held liable for and shall pay all damages that may occur or arise, either to the State or to individuals, in consequence of the construction, maintenance or use of said
or by reason of any work done under or authorized by this permit.

8th. The work authorized by this permit shall be commenced promptly, and progressed to completion within three months from the date of this permit; and in the event that such work is not so commenced and completed within such time, this permit shall be deemed to be revoked, and said work shall not be commenced without a renewal of this permit in writing by the Superintendent of Public Works.

9th. The Superintendent of Public Works *reserves the right at any time to revoke and annul this permit* and cause said....
to remove said.....
and any or all structures placed thereon under this permit at....own cost and expense from off State land; also the right on the part of the State of re-entry and re-occupancy of such lands covered by this permit, as the free and perfect use of said Canal at any future time may require, or as may be necessary for making any repairs, improvements or alterations in the same; or for any cause whatsoever.

10th. Under no circumstances shall any structure erected or maintained on State land under this permit, be used for the sale or storage of intoxicating liquors.

11th. In case of the revocation or cancellation of this permit by the Superintendent of Public Works, it is agreed by said....
, that notice duly mailed to.....
at the address given below, will be deemed by.....
 as full and complete notice of such revocation and cancellation.

 12th. *This permit shall not become effective, nor shall any work be commenced under the same, until the original thereof,*

duly accepted, shall have been returned to the office of the Superintendent of Public Works.

IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed
the official seal of said office, the day
and year first above written.

.....
Superintendent of Public Works.

ACCEPTANCE OF PERMIT

The undersigned,, of.....
....., N. Y., hereby duly acknowledges receipt of
and accepts the foregoing revocable permit issued to.....
.....by the Superintendent of Public Works of the State of
New York, and hereby duly covenants and agrees to faithfully
perform all the requirements and obey all the conditions therein
contained.

In case of the revocation or cancellation of this permit by the
Superintendent of Public Works, notice of same mailed to.....
at.....will be full
and complete notice to.....of such revocation and cancellation.
Dated,, N. Y.,, 191

.....
By.....
.....

(Acknowledgment, if an individual.)

STATE OF NEW YORK, }
County of.....} ss.

On this.....day of.....,
191....., before me, the subscriber, personally appeared.....
.....to me known to be the person
described in, and who executed the foregoing instrument, and he
duly acknowledged to me that he executed the same.

.....
Notary Public

(Acknowledgment, if a corporation.)

STATE OF NEW YORK, }
County of.....} ss.

On this.....day of.....,
191...., before me, the subscriber, personally came.....
.....to me known, who being by me duly
sworn, did depose and say that he resides in.....
.....; that he is the.....
of the.....
the corporation described in and which executed the foregoing in-
strument; that he knows the seal of said corporation; that the
seal affixed to said instrument is such corporate seal; that it was
so affixed by authority of the Board of Directors of said corpora-
tion, and that he signed his name thereto by like authority.

.....
Notary Public

(Acknowledgment, if a firm or co-partnership.)

STATE OF NEW YORK, }
County of.....} ss.

On this.....day of.....,
191...., before me, the subscriber, personally appeared.....
....., to me known and known to
me to be the individual who executed the foregoing instrument
as a member of the co-partnership of.....
....., who being by me duly sworn, did depose and
say, that he resides in.....; that he
is a member of the above-named co-partnership which is composed
of himself and.....
....., who are all the persons interested therein; that he executed
the foregoing instrument on behalf of the said co-partnership and
as a member thereof; that he was authorized to execute the same;
and he acknowledged to me that he executed the same on behalf
of the said co-partnership for the purposes therein stated.

.....
Notary Public

APPENDIX IV.

IN THE MATTER OF CONSTRUING THE CANAL LAW,
SUBDIVISION 13 OF SECTION 33, RELATIVE TO
CUTTING ICE ON STATE CANALS.

(Opinion dated December 19, 1916)

Hon. William W. Wotherspoon, State Superintendent of Public Works, submitted an inquiry as to whether, since the canalization of portions of the Mohawk and Hudson rivers, under subdivision 13 of Section 33 of the Canal Law, in view of the fact that the improvement of the Hudson and Mohawk rivers has been accomplished not only by deepening the same, and, in some localities by raising the pool elevation by means of dams, thus providing a greater area of water than the natural water area, and that at every point on the canalized rivers some improvement has been made which has changed the natural conditions, he has authority to issue permits and exact compensation as a condition of permitting persons to harvest ice therefrom and to exact compensation for cutting ice on said canalized rivers in the following class of cases:

1. Where the river channel has been deepened without appropriation by the State of any land on either side of the river.
2. Where by the appropriation of land on either side of the river the State itself becomes the riparian owner and its land must be crossed to reach the river.
3. Where the elevation of the river has been raised by the construction of dams and areas of the water vastly increased, the State acquiring flowage rights on either shore.
4. Where the sole improvement to the river has been deepening of its bed but no appropriation has been made of land on either side of the stream nor any increase in the surface area.

WOODBURY, Attorney-General. Broadly speaking I am of the opinion that the application of subdivision 13, section 33 of the

Canal Law is limited to the artificial canals of the State and to the works connected therewith such as reservoirs, feeders, etc., and has no application to ice formed on the canalized Hudson and Mohawk rivers.

In determining the rights of the State in the premises two fundamental rules must be borne in mind.

First. The general rule is well settled that on non-navigable rivers, at least, the right to harvest ice is in the owner of the bed thereof.

In 40 Cyc. 844 the rule is laid down that

"Ice forming upon water belongs to the owner of the soil beneath the water."

"A riparian proprietor is the owner of the ice which forms over that portion of the bed of the stream which he owns and has the right to cut and sell it. * * *."

In 29 Cyc. 331 the rule is laid down that

"The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water and the riparian ownership of the bed of a stream carries with it the right to the ice forming upon that surface as far as the riparian right to the soil extends. * * *."

In *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 224; *affd.*, 169 N. Y. 60, the court says: "The owners of the waters of a mill pond own the ice formed upon it. The owner of the bed of a stream owns the ice within it (*Myer v. Whitaker*, 55 How. Pr. 376; *Swan v. Goff*, 39 App. Div. 95) * * *."

The same rule is laid down in *Valentino v. Schantz*, 216 N. Y. 1, where it is said: "A riparian owner above a mill dam has the fixed and well-defined right to take ice from the stream where it flows over his land. The owners of the mill dam cannot avail themselves of such right, notwithstanding the fact that their action may be said to have rendered its exercise possible."

Applying this rule it was held in *Green Island Ice Co. v. Norton*, 105 App. Div. 331; *affd.*, 198 N. Y. 529, that the State being the owner of the fee of the bed of the Mohawk basin it was competent for the legislature to restrict the right to take ice

therefrom to persons obtaining permission so to do from the Superintendent of Public Works.

“ If (says the court) the ice belongs to the owner of the fee where it is formed, then the ice in question here belongs to the State. ‘ Lands appropriated by the canal authorities for the use of the canal, under the statute, are held by the State in fee.’ (Sweet v. City of Syracuse, 129 N. Y. 316, 334; Heacock & Berry v. State of New York, 105 id. 248.)

“ It seems to me that the control that the State has over the canals and their waters is different from that which it exercises over the navigable waters of the State. The one it exercises by right of sovereignty, and ‘ among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable rivers or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water.’ (Smith v. City of Rochester, 92 N. Y. 463, 477.)

“ In the case of its canals, as we have seen, it owns the fee of the land beneath the waters and the strip of land on each side; it owns it as it owns its public buildings, and while that ownership is for the benefit of the people, and one in which the people have an interest, that interest is a collective, not a several interest, not an interest which permits any one of the people by right of first appropriation to take a portion thereof and reduce it to private ownership.”

It will be observed that the court clearly distinguishes between the rights of the State in its canal proper and in its navigable waters canalized.

The same distinction is pointed out in Gould on Waters (3d ed. Sec. 191) where it is said that: “ When the State appropriates the fee of land for the construction of canals, the former owner has no right to take ice therefrom; but if the canal is simply a servitude the owner of the fee is entitled to take the ice when its removal does not interfere with the navigation or the use of the waters for hydraulic purposes.”

A reading of the communication of the Superintendent of Public Works presenting this inquiry discloses that, in the main, the State has, in the exercise of its reserved sovereign right, and

without any appropriation, merely entered upon and improved the navigation of these navigable streams.

Such action did not, in my opinion, serve to divest riparian owners of any riparian rights, or the public of any rights which they possessed in these waters prior to the State's entry. If prior thereto they possessed the right to cut ice thereon the mere fact that the State has seen fit to enter upon and make use of the streams for canal purposes, and accordingly to alter the natural conditions to meet the needs of navigation, does not divest them of those rights.

Riparian owners on these rivers whose title extends to the thread of the stream would seem under the rule heretofore stated (in the absence of the exercise by the State of the power of eminent domain, depriving them of the right), entitled to harvest ice formed on the water within their property lines.

In *Williams v. City of Utica*, 217 N. Y. 162, it was held that the patent therein involved, because of the peculiar language employed, carried title to the bed of the Mohawk river; but in the more recent case of *Danes v. State*, 219 N. Y. 67, the Court of Appeals reiterates the general rule that the title to the beds of the Mohawk and Hudson rivers above, as well as below the influence of the tide, is in the State.

I think it may fairly be laid down as a general rule, permitting of but few exceptions, that the State holds fee title to the beds of the Mohawk and Hudson rivers, but it holds this title not as a proprietor but as a sovereign in trust for the people.

As stated in *Rosemiller v. State*, 58 L. R. A. (Wis.) 93, 98:

"Wherever the title to the beds of navigable waters is in the State for public purposes, all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish, etc."

The rule is stated in 29 Cyc. 331 as follows: "In the absence of a statute to the contrary, where the State owns the bed of a stream, the right to cut ice thereon is a common right of the public, where there is no interference with any other person to a like enjoyment, subject only to such mere police regulations as the legislature may prescribe to preserve the common right. Subject to such rules, one person has the same right to the ice formed upon

public waters as has another until there has been an actual appropriation of such ice. The State is not the owner of ice formed on public waters, and has no right to sell it. The limit of State authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so."

In *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 224; *affd.*, 169 N. Y. 60, the court says: "The State owns the Hudson river in trust for the use of the public. Apart from the statute about to be considered (referring to the statutes now embodied in Art. XVI of the General Business Law), the ice formed upon it, like the fish within it, becomes the property of the captor who first peacefully seizes it."

The opinion of the Court of Appeals in the same case (169 N. Y. 60, 72) states that: "The Hudson river being a navigable stream, the ice formed therein belongs to the first appropriator and the right to take it is one owned in common with the public; except as an exclusive privilege is conferred by the statute upon the owners, or lessees, of ice houses on the river of cutting and gathering the ice formed in the waters adjacent to their lands, upon compliance with certain conditions. (Chap. 953, Laws of 1895; Chap. 388, Laws of 1879.)"

In *American Ice Co. v. Catskill Cement Co.*, 43 Misc Rep. 221, 226, the court says, speaking of the Hudson river, that: "It has been the law of this State until the legislature otherwise decreed (By Chap. 953, Laws of 1895 and Chap. 264, Laws of 1899) that this ice was common property and belonged to the first appropriator." See also *Briggs v. Knickerbocker Ice Co.*, 11 Misc. Rep. 197.

The New York cases cited had to do with the Hudson, a river navigable in law as well as in fact; but the authorities appear to apply the rule there laid down to rivers navigable in fact but not in law (such as the Mohawk, and the Hudson above tide water), the title to which is held by the State as a sovereign in trust for the public, and to hold that: "The right of every person within the State to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like en-

joyment, subject only to such mere police regulations as the legislature may in its wisdom prescribe to preserve the common heritage of all is a constitutional right of all persons within the State," and that the State possesses no such property right or interest in the waters of such streams or the ice formed therefrom as will permit it to sell the same. *Rosemiller v. State*, 58 L. R. A. (Wis.) 93.

The distinction in this respect between ice forming on canalized streams and on artificial canals is adverted to in the opinion of the court in *Green Island Ice Co. v. Norton*, *supra*. It lies in the different character of the State's ownership of the two things.

As to ice forming upon its public rivers which have merely been canalized, the only power possessed by the State is one of regulation.

So far as the Hudson is concerned, the upland owners possessing ice houses on the banks thereof are afforded a preferential right to the ice forming thereon by virtue of the provisions of article XVI of the General Business Law, which has been sustained by the courts only as an exercise of the State's power to *regulate* the taking or appropriation of the ice. *Slingerland v. International Contracting Co.*, 43 App. Div. 215; *affd.*, 169 N. Y. 60.

Applying these rules to the above enumerated situations:

1. The fact that the State has entered upon these rivers and merely canalized and deepened them (without making any appropriation) does not in my opinion operate to divest riparian owners or the public of their former rights to the ice formed thereon.

2. The fact that the State has appropriated or owns portions of the banks of these rivers has no bearing on the question of the right of the public or the riparian owners to cut ice thereon, the determining factors being that the rivers are public navigable rivers and, assuming that the State has any title to the bed, it is as a sovereign in trust for the public.

3. With respect to the situations enumerated in the third classification, I am informed that at certain points on the Hudson and Mohawk rivers the State has erected dams which cause the water to overflow the natural banks of the river and submerge large areas of natural upland to which the State has by appropriation or otherwise obtained the absolute fee title. Thus a large ice field

has been created on and over land outside of the natural bed of the river, to which land the State owns the absolute fee title.

While the State has no title to the ice formed within the limits of the natural bed of these rivers, applying the rule laid down in *Green Island Ice Co. v. Norton*, *supra*, and other cases, I am persuaded that it has such a proprietary title to and interest in the ice formed on these artificial areas, without the limits of the natural bed, that it may sell or dispose of the same and that the aforesaid provisions of Section 33 of the Canal Law apply to ice found on these areas.

4. Under the state of facts assumed in the fourth classification I think the State does not possess the right to sell the ice formed upon these rivers.

I have not considered it necessary and have not intended by the foregoing to express any opinion as to whether the riparian owners along these streams possess any rights in the ice formed thereon superior to the rights of the general public.

APPENDIX V.

PRIVILEGES IN CONNECTION WITH CANAL LANDS

REG. 71. *Trespassing on canal lands.* No person shall enter upon, occupy or make use of any canal lands, or use or occupy any structure thereon, without permission in writing from the Superintendent of Public Works. Section 466 of the Penal Law makes a violation a misdemeanor.

REG. 72. *Removal of materials a felony.* No person shall take or remove from canal lands any earth, sand, gravel, rock, grass, hay, timber or brush, or any article or thing, without permission in writing from the Superintendent of Public Works. Section 466 of the Penal Law makes a violation a misdemeanor.

REG. 73. *Ice cutting privilege.* No person shall cut ice from any of the canals of the State without permission in writing from the Assistant Superintendent of Public Works. The standard fee for ice-cutting privilege is \$25 per acre.

REG. 74. *Permits for privileges on canal lands.* Under the Constitution, any permit issued by the Superintendent of Public Works must be subject at all times to revocation. No lease, easement or permanent right in connection with the canals or the lands connected therewith may be granted. Application for any privilege on or in connection with canal lands should be made to the Superintendent of Public Works, and should set forth clearly the nature of the privilege desired. If temporary occupation of the land is desired the proposed use should be clearly set forth and a tracing plan 8½ inches wide and as long as may be necessary, drawn to scale, should be submitted, showing the location of the land proposed to be used, or which will be affected by the granting of such privilege, and the ownership of adjacent lands.

REG. 75. *Expense of investigations.* The actual and necessary expense incurred by the Superintendent of Public Works, or his

representative, in making an investigation and report on any application may, in the discretion of the Superintendent of Public Works, be charged to the applicant for such permit, and if the Superintendent of Public Works so requires, such applicant shall advance the necessary funds to meet such expense previous to the making of such investigation.

REG. 76. *Considerations for permits.* A consideration may be imposed in any permit granted by the Superintendent of Public Works for the use of canal lands. The granting of a permit to any person for the occupancy or use of any canal lands or any buildings or structures upon the same shall not constitute a relation between the State and such party of landlord and tenant, but such permit shall be deemed a naked license only to the party receiving such permit to enjoy the privileges conferred by it at his own risk and responsibility until such permit is revoked or canceled by the Superintendent of Public Works. No permit issued by the Superintendent of Public Works shall be deemed in force or effect until the same has been duly accepted by the party receiving the permit, and such acceptance in the form specified by the Superintendent of Public Works shall be filed in his office.

REG. 77. *Permits, by whom issued.* No official or any employee connected with the State canals, other than the Superintendent of Public Works, or the Deputy Superintendent of Public Works, shall have the right or authority to grant or give any right or permit to enter upon, occupy or make use of the canal lands or the structures connected therewith, or to take from such lands any material or thing under the control of the Superintendent of Public Works. A permit for any such purpose which does not bear the signature of the Superintendent of Public Works or the Deputy Superintendent of Public Works, will be deemed to have been issued without authority.

REG. 78. *Permits revocable.* Every permit of whatsoever kind issued by the Superintendent of Public Works or the Deputy Superintendent of Public Works shall be revocable at any time by the Superintendent of Public Works.

REG. 79. *Permits not transferable.* No permit issued by the Superintendent of Public Works or the Deputy Superintendent of Public Works shall be assigned or transferred without the

consent in writing of the Superintendent of Public Works or the Deputy Superintendent of Public Works. Violation of this regulation in itself will invalidate the permit.

REG. 80. *Permits for residence, etc., not granted.* No permits for the use of canal lands for residential purposes, or for the sale of malt or spirituous liquors will be granted, nor shall any of the canal lands be used for speculative purposes. A permit when granted shall be for the use and benefit of the person receiving it only.

REG. 81. *Penalty for violation of regulations.* Unless otherwise specifically provided, the penalty for a violation of either of the foregoing regulations shall be as fixed by the Superintendent of Public Works, the amount of which penalty shall not be less than five dollars nor more than twenty-five dollars for each violation. The imposition on, or payment of a penalty by, an offender shall not relieve him from payment to the State of such sum as shall reasonably cover the cost and expense of repairing or renewing any structure injured or damaged by his act.

Adopted and issued August 1, 1917.

Filed in the office of the Comptroller August 1, 1917.

NOTE.—For any amendments or changes inquire of Superintendent of Public Works.

APPENDIX VI.

RULES AND REGULATIONS GOVERNING THE PROCEDURE IN CONNECTION WITH THE ACQUISITION OF LANDS PURSUANT TO THE PROVISIONS OF CHAPTER 569 OF THE LAWS OF 1916, AND CHAPTER 146 OF THE LAWS OF 1917, AS AMENDED.

(Adopted April 25, 1918)

PURCHASE

The Conservation Commission shall make a thorough examination of such lands as are offered for sale to the State for State park purposes and desired by the Commission, for the purpose of ascertaining conditions of the forest growth thereon and the value of such lands.

If the Conservation Commission after determining the value of the lands offered, can agree with the owner thereof upon a price for same, the Commission shall obtain from the owner a formal offer in writing which shall include the following:

- A. Specific description of the lands offered for sale.
- B. In case of reservations, a specific description of the property or rights to be reserved.
- C. Price at which said lands are offered.
- D. Same shall be executed and acknowledged in duplicate.

In case an offer in writing is satisfactory to the Conservation Commission and approved as to form by the Attorney General, the Conservation Commission may recommend to the Commissioners of the Land Office the purchase of the lands so offered in the following manner:

A. By a formal letter of recommendation in duplicate stating price, name of owner with address, and a brief description of the property, signed by the Commissioner.

B. Submit on white paper for filing in loose leaf cover, a synopsis of the land and such information as may be useful to the Commissioners of the Land Office, same to be dated.

C. Submit on pink paper for filing in loose leaf cover, copies of reports of foresters, appraisers and others in regard to condition of property and its value.

D. Submit a suitable map, showing location of the land and its location relative to land which the State now owns.

E. Submit one of the duplicate offers.

F. Whenever possible there shall also be submitted a statement showing the assessed valuation of the lands offered as shown by the last preceding assessment-roll of the town in which such lands are situated.

The Commissioners of the Land Office shall consider such recommendations for the purchase of lands, and to that end shall hold a regular meeting on the last Thursday of each month at 10:30 o'clock in the forenoon.

A. The secretary of the Commissioners of the Land Office shall prepare a calendar upon which these recommendations shall be tabulated by name, number, etc.

B. The action of the Commissioners of the Land Office upon these recommendations shall be by resolution and duly entered in its minutes.

If the Commissioners of the Land office *consent* to the purchase of the lands offered, and approve of the offer and of the recommendations of the Conservation Commission to purchase same, the Commissioners of the Land Office shall adopt a resolution to that effect.

If the Commissioners of the Land Office accept the recommendations of the Conservation Commission, upon conditions different from those recommended, the Conservation Commission shall be so advised and if said Commission approves, then the matter shall be submitted to the owner of the land for his consideration and approval or rejection.

If, for any reason, the Commissioners of the Land Office do not deem it advisable to formally *consent* to the purchase of lands offered for sale or to purchase such lands subject to the exceptions, reservations or conditions imposed, they may, however, by resolution *advise* the purchase of such lands on certain expressed conditions imposed by them.

Whenever the purchase of any lands has been recommended by the Conservation Commission and the recommendation approved by the Commissioners of the Land Office, the Conservation Commission shall notify the Attorney General to that effect and shall furnish a description of the land with such abstracts of title as it has and with other information which shall be of assistance in the examination of the title to said lands, including a copy of the offer.

The Attorney General shall thereupon examine the title to the lands offered for sale. If he approves such title then he shall so advise the owner of such lands. The Attorney General shall obtain from the owner of said lands a conveyance thereof to the State in escrow. If the conveyance is approved by the Attorney General, the owner thereupon shall execute a receipt or voucher in triplicate on a form to be prepared by the Conservation Commission, with the approval of the Attorney General, which shall thereafter be endorsed, so as to show:

A. Recommendation of the Conservation Commission.

B. Approval of the Commissioners of the Land Office by certificate of the Secretary thereof.

C. Certificate of the Attorney General as to the approval of the title to the lands described in the voucher and also the conveyance thereof.

Before the execution of such certificate of approval by the Attorney General, he shall deliver the conveyance to the county clerk of the county in which the lands offered are situated, for record, and the search and examination of title shall be continued to that date.

After the endorsement of the voucher by the Attorney General, the voucher, together with all title papers, shall be forwarded by the Attorney General to the Conservation Commission.

If the Attorney General disapprove the title to the whole or part of the lands described in the offer, he shall return the offer to the Conservation Commission stating his reasons.

In case of disapproval of title to part of the lands offered and approval as to part, the Conservation Commission shall be notified by the Attorney General, as to the parts of the tract as to which title is approved and as to the parts not approved. The Commission shall then determine the value of the part approved and negotiate with the owner therefor. If such negotiations result in an agreement, the Conservation Commission shall again bring the matter before the Commissioners of the Land Office in the same manner as if it were an original offer and the same proceedings shall be had.

APPROPRIATION.

In case the Conservation Commission shall desire to acquire any lands by entry and appropriation:

(a) If a search and examination of title to lands desired have not been made, and if the Conservation Commission has not the information on which to base the certificate required by Subdivision 2 of Section 59 of the Conservation Law, requiring among other things an "accurate description," the Conservation Commission shall recommend such entry and appropriation to the Commissioners of the Land Office in writing, describing the lands and interest in lands desired as accurately as possible.

If the Commissioners of the Land Office shall approve such entry and appropriation, a resolution, *advising* and approving such entry and appropriation should be adopted by the Commissioners.

(b) If a search and examination of title to lands desired have been made, and if the Conservation Commission has the information on which to base the certificate required by Subdivision 2 of Chapter 59 of the Conservation Law, the Conservation Commission shall so advise the Commissioners

of the Land Office, and shall recommend such entry and appropriation to the Commissioners of the Land Office in writing, accurately describing the lands and interest in lands desired.

If the Commissioners of the Land Office shall approve such entry and appropriation, a resolution, *consenting* to the entry and appropriation should be adopted by the Commissioners.

If such resolution of consent is adopted, by the Commissioners of the Land Office, a certificate to that effect containing such accurate description of such lands, or interest in lands shall be signed by all of the Commissioners of the Land Office present and consenting at the meeting at which the resolution of consent shall be adopted. Such certificate or *consent* shall be filed in the office of the clerk of the county in which the lands are situated.

The *consent* is to be prepared and immediately filed in the county clerk's office by the Secretary of the Commissioners of the Land Office after approval thereof as to form by the Attorney General.

The Conservation Commission shall also file in the office of the Secretary of State, the description of the lands and interests therein to be appropriated together with the certificate as to accuracy and the notice endorsed thereon required by Subdivision 2 of Section 59 of the Conservation Law.

After such examination of title by the Attorney General, the Attorney General shall advise the Conservation Commission as to the persons to be served with notice, as required by Subdivision 3 of Section 59 of the Conservation Law.

The Conservation Commission shall thereupon serve notice of the filing of the description, certificate and notice endorsed thereon, in the office of the Secretary of State, as required by Subdivisions 3 and 4 of Section 59 of the Conservation Law. Particular attention is called to the fact that a *duplicate original* of the description and certificate that same is correct, signed by the Commission and a *duplicate original* of the notice endorsed thereon signed by the Commission, together with an original notice of the filing to be also signed by the Commission, is necessary for service upon the owners.

NOTE.—Consult Secretary of State for any amendments to these rules.

APPENDIX VII.

MARCH 11, 1920.

HON. GEORGE D. PRATT, *Conservation Commissioner*,
Albany, N. Y.:

* * * * *

The question to which you seek an answer seems to be, whether, in buying land for Forest Preserve purposes, existing highways, if any, crossing the lands to be purchased, or following boundary lines so that one-half of the highway is within the boundaries of such land, should be surveyed out and excepted from the description; or whether, on the other hand, the whole title should be acquired subject to an easement of any existing highways.

* * * * *

Every practical consideration demands that existing highways should not be excepted. I infer from your letter, however, that you are in doubt as to the power of the State to purchase highways and permit them to be maintained over land purchased for Forest Preserve purposes. This question was fully answered, in principle, in the opinion of Attorney General Woodbury dealing with the right of town authorities to open and improve a highway running along the south side of the Fulton Chain of lakes upon a right of way reserved therefor by Dr. Webb in his deed of the land to the State. You have a copy of that opinion.

It was there held that the State took title to the land subject to the easement, and that the opening of the highway did not offend against any constitutional provision.

* * * * *

In buying land for Forest Preserve purposes, the State is in the same position as any other purchaser. It takes title subject to existing rights. The State is not bound to take steps to extinguish an existing easement on land purchased simply because the land is to become part of the Forest Preserve. Highways, if

deemed necessary for public convenience, not only may but should be allowed to remain and to be freely enjoyed by the public. If the State acquires the fee of a highway, subject to an easement, and the highway is afterwards abandoned, the land may then be devoted to Forest Preserve purposes under the direction of the Conservation Commission.

APPENDIX VIII.

FORM OF CERTIFICATE AS TO PROBATE OF WILL.

THE PEOPLE OF THE STATE OF CONNECTICUT,
BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To all to whom these presents shall come or may concern, Greeting:

KNOW YE, That we having examined the records and files in the office of the Probate Court for the District of New Haven, Connecticut, do find there a certain record of the last will and testament of, deceased, together with the proofs, decrees and proceedings attending the probate thereof (said will having been duly admitted to probate as a will of real and personal property on the 28th day of March, 1847, and executed and proven agreeably to the laws and usages of Connecticut), in the words and figures following, to wit:

(Here insert will together with proofs or statement as to substance of proofs.)

All of which we have caused by these presents to be exemplified and the seal of our said Probate Court to be hereunto affixed.

WITNESS, Hon., a Judge of the Probate Court for the District of New Haven, State of Connecticut, at the City of New Haven, the day of October, 1919.

.
Clerk of the Probate Court,
District of New Haven, Connecticut.

I,, a Judge of the Probate Court for the District of New Haven, Connecticut, and presiding magistrate of said Court, do hereby certify that, whose name is subscribed to the preceding exemplification, is the clerk of the said Probate Court for the District of New Haven, Connecticut, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the

seal of our said Probate Court, and that the attestation thereof is in due form according to the form of attestation used in this State.

Dated, New Haven, October . . , 1919.

.....
Judge of the Probate Court,
 District of New Haven, Connecticut.

I,, Clerk of the Probate Court for the District of New Haven, Connecticut, do hereby certify that Hon., whose name is subscribed to the preceding certificate, is the presiding magistrate of the said Probate Court for the District of New Haven, Connecticut, duly elected, sworn and qualified and that the signature of the said magistrate to said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this day of October, 1919.

(SEAL)

.....
Clerk of the Probate Court,
 District of New Haven, Connecticut.

STATE OF CONNECTICUT, }
 OFFICE OF THE SECRETARY OF STATE, } ss.:

I,, Secretary of the State of Connecticut, and the officer having the custody of the Great Seal of the said State, do hereby certify that the Probate Court of the District of New Haven, Connecticut, was at all times during the year 1847, duly authorized under the Laws of Connecticut to admit wills to probate in and for the said District and to grant letters testamentary thereon and to keep such wills, their proofs, and letters and the records thereof; that the seal of said Court affixed to the annexed copy of the will and its proofs is genuine, and that I verily believe that the respective signatures of the Judge and Clerk of the said Probate Court attesting such copy are genuine.

IN TESTIMONY WHEREOF, I have hereunto set my signature and affixed the Great Seal of the said State of Connecticut at Hartford in the said State, this day of October, 1919.

(SEAL)

.....

APPENDIX IX.

COUNTIES OF THE STATE OF NEW YORK IN THE ORDER OF THEIR
ERECTION.

Name.	No.	From what taken.	Date of erection.
Albany	1	(Original).....	November 1, 1683
Dutchess	2	(Original).....	November 1, 1683
Kings	3	(Original).....	November 1, 1683
New York	4	(Original).....	November 1, 1683
Orange	5	(Original).....	November 1, 1683
Queens	6	(Original).....	November 1, 1683
Richmond	7	(Original).....	November 1, 1683
Suffolk	8	(Original).....	November 1, 1683
Ulster	9	(Original).....	November 1, 1683
Westchester	10	(Original).....	November 1, 1683
Montgomery ¹	11	Albany	March 12, 1772
Washington ²	12	Albany	March 12, 1772
Columbia	13	Albany	April 4, 1786
Clinton	14	Washington	March 7, 1788
Ontario	15	Montgomery	January 27, 1789
Rensselaer	16	Albany	February 7, 1791
Saratoga	17	Albany	February 7, 1791
Herkimer	18	Montgomery	February 16, 1791
Otsego	19	Montgomery	February 16, 1791
Tioga	20	Montgomery	February 16, 1791
Onondaga	21	Herkimer	March 5, 1794
Schoharie	22	Albany and Otsego.....	April 6, 1795
Steuben	23	Ontario	March 18, 1796
Delaware	24	Ulster and Otsego.....	March 10, 1797
Rockland	25	Orange	February 23, 1798
Chenango	26	Tioga and Herkimer.....	March 15, 1798
Oneida	27	Herkimer	March 15, 1798
Essex	28	Clinton	March 1, 1799
Cayuga	29	Onondaga	March 9, 1799
Greene	30	Albany and Ulster.....	March 25, 1800
St. Lawrence ³	31	Clinton	March 3, 1802
Genesee	32	Ontario	March 30, 1802
Seneca	33	Cayuga	March 24, 1804

¹ As *Tryon*; changed April 2, 1794.² As *Charlotte*; changed April 2, 1784.³ Parts of Montgomery, Herkimer and Oneida, provisionally annexed.

Name.	No.	From what taken.	Date of erection.	
Jefferson	34	Oneida	March	28, 1805
Lewis	35	Oneida	March	28, 1805
Madison	36	Chenango	March	21, 1806
Broome	37	Tioga	March	28, 1806
Allegany	38	Genesee	April	7, 1806
Cattaraugus	39	Genesee	March	11, 1808
Chautauqua	40	Genesee	March	11, 1808
Franklin	41	Clinton	March	11, 1808
Niagara	42	Genesee	March	11, 1808
Cortland	43	Onondaga	April	8, 1808
Schenectady	44	Albany	March	7, 1809
Sullivan	45	Ulster	March	27, 1809
Putnam	46	Dutchess	June	12, 1812
Warren	47	Washington	March	12, 1813
Oswego	48	Oneida and Onondaga....	March	1, 1816
Hamilton	49	Montgomery	April	12, 1816
Tompkins	50	Cayuga and Seneca.....	April	7, 1817
Livingston	51	Genesee and Ontario....	February	23, 1821
Monroe	52	Genesee and Ontario....	February	23, 1821
Erie	53	Niagara	April	2, 1821
Yates	54	Ontario	February	5, 1823
Wayne	55	Ontario and Seneca.....	April	11, 1823
Orleans	56	Genesee	November	12, 1824
Chemung	57	Tioga	March	29, 1836
Fulton	58	Montgomery	April	18, 1838
Wyoming	59	Genesee	May	14, 1841
Schuyler	60	Chemung, Steuben and Tompkins	April	17, 1859
Nassau	61	Queens	January	1, 1899
Bronx	62	New York ⁶	January	1, 1914 ⁴

⁴See Chap. 548, Laws of 1912.

⁶A portion of Westchester county was annexed to New York county in 1873 and 1895.

APPENDIX X-A.

AFFIDAVIT OF TITLE.

PURCHASE.

Proposal No.....
 Park.....
 County.....
 Owner.....

STATE OF NEW YORK, }
 COUNTY OF..... } ss.:

....., being duly sworn, deposes and says:

FIRST. That he resides in the of,
 county of, State of,
 that

.....
 is the owner in fee simple of and has good right to convey the
 land situate in the of, county of,
 said State, consisting of acres and described in a deed
 executed on the day of, 19....,
 by said
 to the People of the State of New York and delivered to the
 Attorney General in escrow.

SECOND. That deponent is acquainted with the location and
 boundaries of said land which is the same land
 conveyed to
 by
 by deed dated which deed is recorded
 in county clerk's office in Liber.....
 of Deeds at page

THIRD. That predecessors in title have to de-
 ponent's knowledge (or as deponent is informed by affidavit of
 hereunto attached and believes) occupied

and been in the quiet and peaceable possession of the said lands during all their respective periods of ownership claiming title thereto under written instruments; that such possession has been open, notorious and adverse to any claim of ownership by any other party and has been undisturbed; that neither the title to said lands nor the possession thereof by nor by any of predecessors in title has ever been disputed or questioned to deponent's knowledge, information and belief; that no person, other than and predecessors in title, has ever had or claimed any right, title or interest in or to said land, or any part thereof, by actual occupation or by unrecorded deed; that and predecessors in title, and no other person or persons, have received the rents and profits of the said land for the past years and more; that said land has had no occupants upon whom notice of redemption from tax sales had to be or should have been served, in particular during the years, that deponent has no knowledge or information or the existence of any school, highway or town tax collector's, county treasurer's or comptroller's receipt for taxes showing payment of any tax for default of payment whereof the land, or any part thereof, described in the deed so delivered in escrow, was sold at any tax sale; that deponent knows of no reason by which said title and possession may be disputed or questioned, and no reason by which any claim to any part thereof, or to any undivided interest therein, adverse to or predecessors in title, could or might be made or set up.

FOURTH. (For Proof of Occupation.)

FIFTH. That said land is free and clear from all encumbrances, liens, transfers, charges, estates, rights, trusts or interests, contracts of sale, special agreements, surveys, encroachments, easements of every kind and nature, especially those relating to telegraph, telephone or other electric wires and lines, private trails and roads, tote roads, rights of way and flowage rights of every kind and nature, oral or written, recorded or unrecorded, or public highways, except

SIXTH. That there is no existing lease, oral or written, recorded or unrecorded, affecting said land or any part thereof, to any tenant or other person, but said land is actually and exclusively possessed by and previously was so possessed by predecessors in title, as deponent is informed and believes, and by no other person or corporation, either as tenant or otherwise; that said land has never had any actual occupant other than....., predecessors in title or their legal tenants and lessees, as deponent is informed and believes, except

SEVENTH. That all maps, deeds, conveyances and other papers and documents relating to or in any manner affecting the title to and right of possession of the premises described in this proposal, of which deponent has knowledge or information, have been submitted to the Title Bureau of the Attorney General's office.

EIGHTH. Deponent further says that there is no judgment against....., unpaid or unsatisfied of record docketed in any of the counties of the State of New York or in the United States Courts within the State of New York.

NINTH. That no proceedings in bankruptcy have ever been instituted by or against....., in any court or before any officer of any State or of the United States.

TENTH. Deponent further says that..... is not at this time a bondsman upon any bond for any tax collector.

ELEVENTH. Deponent further says that..... has not done nor suffered anything whereby said land has been encumbered since the delivery of said deed in escrow, or previous thereto.

TWELFTH. Deponent further says that he is a citizen of the United States, is over the age of twenty-one years and is..... married to....., who is over the age of twenty-one years, and of sound mind.

Deponent further says that all the statements and representations in this affidavit contained are made in order to induce the

People of the State of New York to pay.....
 the money agreed upon for the lands so conveyed to the said people,
 described in said deed, so delivered in escrow.

.....

Sworn to before me this.....day }
 of....., 19.. }

.....

Notary Public

NOTE: Do not sign and swear to this affidavit until after it has been carefully read and is fully understood, as the statements herein contained are important.

APPENDIX X-B.

AFFIDAVIT OF TITLE.

APPROPRIATION.

Proposal No.
 Park.
 County.
 Owner.

STATE OF NEW YORK, }
 COUNTY OF. } ss.:

....., being duly sworn, deposes and says:

FIRST. That he resides in the of
 county of, N. Y.; that

 at the time of the appropriation thereof by the People of the State
 of New York, on the day of,
 19....., was the owner..
 in fee simple of the lands situate in the town of
, county of, N. Y., consisting of about
 acres, described in the Duplicate Description of Lands
 Appropriated heretofore served upon
, by the People.

SECOND. That deponent is acquainted with the location and
 boundaries of said premises so appropriated, which said lands are
 the lands conveyed to
 by by
 dated, 19....., recorded in
 county clerk's office in Liber of deeds, page;
 that said premises are correctly described in said Duplicate De-
 scription of Lands Appropriated; and that said lands were never
 before appropriated by the People of the State of New York.

THIRD. That predecessors in title have to deponent's knowledge (or as deponent is informed by affidavit of hereunto attached and believes) occupied and been in the quiet and peaceable possession of the said lands during all their respective periods of ownership claiming title thereto under written instruments; that such possession has been open, notorious and adverse to any claim of ownership by any other party and has been undisturbed; that neither the title to said lands nor the possession thereof by nor by any of predecessors in title has ever been disputed or questioned to deponent's knowledge, information or belief; that no person, other than and predecessors in title, has ever had or claimed any right, title or interest in or to said land, or any part thereof, by actual occupation or by unrecorded deed; that and predecessors in title, and no other person or persons, have received the rents and profits of the said land for the past years and more; that said land has had no occupants upon whom notice of redemption from tax sales had to be or should have been served, in particular during the years, that deponent has no knowledge or information of the existence of any school, highway or town tax collector's, county treasurer's or comptroller's receipt for taxes showing payment of any tax for default of payment whereof the land, or any part thereof, so appropriated was sold at any tax sale; that deponent knows of no reason by which said title and possession may be disputed or questioned, and no reason by which any claim to any part thereof or to any undivided interest therein, adverse to or predecessors in title, could or might be made or set up.

FOURTH. (For Proof of Occupation.)

FIFTH. That said land is free and clear from all encumbrances, liens, transfers, charges, estates, rights, trusts or interests, contracts of sale, special agreements, surveys, encroachments, easements of every kind and nature, especially those relating to telegraph, telephone or other electric wires and lines, private trails and roads,

tote roads, rights of way and flowage rights of every kind and nature, oral or written, recorded or unrecorded, or public highways, except

SIXTH. That at the time of said appropriation there was no existing lease, oral or written, recorded or unrecorded, affecting said land or any part thereof, to any tenant or other person, but said land is actually and exclusively possessed by.....
, and previously was so possessed by..... predecessors in title, as deponent is informed and believes, and by no other person or corporation, either as tenant or otherwise; that said land has never had any actual occupant other than....., predecessors in title or their legal tenants and lessees, as deponent is informed and believes, except

SEVENTH. That all maps, deeds, conveyances, and other papers and documents relating to or in any manner affecting the title to and right of possession of the premises described in this proposal, of which deponent has knowledge or information, have been submitted to the Title Bureau of the Attorney General's office.

EIGHTH. Deponent further says that there is no judgment against....., unpaid or unsatisfied of record docketed in any of the counties of the State of New York or in the United States Courts within the State of New York.

NINTH. That no proceedings in bankruptcy have ever been instituted by or against....., in any court or before any officer of the State or of the United States.

TENTH. Deponent further says that..... is not at this time a bondsman upon any bond for any tax collector.

ELEVENTH. Deponent further says that..... is a citizen of the United States, is over the age of twenty-one years, and is married to....., who is over the age of twenty-one years, and of sound mind, and that.....
, mentioned and described in the judgment of the Court of Claims, or in the agreement of adjustment, dated the.....day of....., 19...., is.....the owner.. of said lands.

Deponent further says that all the statements and representations in this affidavit contained are made in order to induce the People of the State of New York to pay to..... the money adjudged by the Court of Claims, or in accordance with the agreement of adjustment, to be paid by said people for the lands so appropriated.

.....
 Sworn to before me this.....day {
 of....., 19.. }

.....
Notary Public

NOTE: Do not sign and swear to this affidavit until after it has been carefully read and is fully understood, as the statements herein contained are important.

APPENDIX XI.

STATE OF NEW YORK

COMMISSIONERS OF THE LAND OFFICE

Rules and Regulations Governing Applications for Grant or Conveyance of Lands

ESCHEATED TO THE STATE

RESOLVED: That every applicant for a grant or conveyance of land which has escheated to the State, shall comply with the following regulations:

I. Every such applicant, previous to the filing of his application, shall give notice thereof, by advertisement, to be printed once each week for three successive weeks, in a newspaper published in the county wherein is situated the escheated land, intended to be applied for. The first publication of said notice shall be at least twenty-one days before the date of application. Said notice shall contain a brief description of the land sought to be released.

II. Every such applicant shall, previous to the filing of his application, cause a copy of such advertisement to be posted upon the door of the Court House of the County, wherein is situated the escheated land, so intended to be applied for. The posting of said notice shall be at least twenty-one days before the date of application, and a copy of said notice shall be served at least twenty-one days before the date of application upon the occupants of said premises, if any, and also upon all persons having or claiming to have an interest other than the petitioners therein.

III. Every such advertisement, or notice, shall be in the following form:

NOTICE OF APPLICATION FOR A GRANT OF LAND ESCHEATED TO
THE STATE.

TAKE NOTICE: That the undersigned will file with the Commissioners of the Land Office, in Albany, New York, on the..... day of....., an application for the release to him of any interest which the People of the State of New York may have in the real estate, situate in the..... and briefly described as follows:..... owned by..... deceased, at the time of his death, by reason of the alienage or failure of heirs of the said deceased. Such application is drawn and will be presented in conformity with the provisions of Article 5, Chapter 50, of the Laws of 1909, as amended.

IV. Every such applicant shall file with the Commissioners the following papers, in support of his application:

a. A petition properly verified by the applicant, setting forth, in brief, the facts required by the statutes, and upon which the claim for a release is based.

b. A copy of the advertisement or notice above mentioned, together with proof of such publication, posting and service.

c. The affidavits of at least three disinterested persons, corroborative of the essential facts alleged in the petition and required by the statutes to be proved as the basis for the release sought. One of said affidavits shall be made by a real estate dealer, familiar with the real property of the deceased, showing the value of the real property sought to be released, and the value of all property of the deceased, which shall have escheated to the State and shall not have been conveyed or released by the State.

V. Every applicant will also be required to furnish a complete abstract of title including county clerk's and tax searches, subject to the approval of the Attorney-General, showing all conveyances and liens affecting the title of the premises sought to be released, from the time the decedent whose estate escheated acquired title to the time of the application.

NOTE. Consult Secretary of State for any amendments or changes.

APPENDIX XII.

COMMISSIONERS OF THE LAND OFFICE

ALBANY, N. Y.

Resolutions governing applications to acquire the State's interest in and to lands, the title to which was acquired by the State through tax sales.

Resolved, That hereafter all persons applying as owners or interested parties shall be required to furnish, with their application, sworn proof of ownership of or interest in the land applied for, subject to approval by the Attorney-General. (Adopted March 25, 1915.)

Resolved, That in all cases of applications by non-owners for purchase of State lands bought in by the State at tax sales, the applicant be required to furnish proof by affidavit of service of notice of the application to purchase upon the last title owner of said premises. Said notice shall be served upon said owner either personally ten days before the filing of said application or by publication once a week for three successive weeks, (the last publication to be at least ten days before the filing of said application) in one of the newspapers, published in the county in which said property is situate, which have been last duly designated by the Board of Supervisors of said county as newspapers in which Session Laws are to be published. (Adopted March 25, 1915.)

In applications by owner or interested party the offer should not be less than cost to State, including the expenses of the advertisement and sale thereof.

In applications by non-owner, the offer should not be less than the appraised value.

FORM OF NOTICE OF APPLICATION BY A NON-OWNER.

(Notice should be addressed to last record owner.)

Take Notice: That the undersigned will file with the Commissioners of the Land Office, in the city of Albany, New York, on the..... day of, 19.., an application for the advertisement and sale at public auction of tax lands in the.....and briefly described as follows:

.....

Petitioner.

STATE OF NEW YORK,
 COMMISSIONERS OF THE LAND OFFICE.
 In the matter of the petition of.....

 for the advertisement and sale at public
 auction of tax lands.

To the Commissioners of the Land Office:

Your petitioner,.....residing at.....

(Name.)

(If in a city of

.....hereby

over five hundred thousand inhabitants give residence and street number.)

applies as owner, non-owner, for the advertisement and sale at

(Use whichever applicable.)

public auction of the following described lands:

Your petitioner agrees to bid at a public sale thereof.....

.....

Petitioner.

Address all communications:

COMMISSIONERS OF THE LAND OFFICE,
Office of Secretary of State, Albany, N. Y.

NOTE. Proofs required by above resolutions must be furnished.

APPENDIX XIII.

HISTORY OF WATER GRANTS.

The Commissioners of the Land Office were created by Chapter 60 of the Laws of 1784 — the Board to consist of the Governor, Lieutenant-Governor, Speaker of the Assembly, Secretary of State, Attorney-General, Treasurer and Auditor. They were empowered to direct the disposing and granting of the waste and unappropriated lands within the State — any three of the Commissioners, including the Governor, to be a quorum for the transaction of business. The act provides for the issuance of letters patent for lands to contain conditions for the actual settlement thereof within three years, and for reservation of mines of gold, silver and salt, also of salt lakes and carrying places on water communications. No form of letters-patent was prescribed.

These Commissioners were continued by Chapter 66 of the Laws of 1785. This act prescribes the form of letters-patent containing conditions for settlement of lands to be granted by said Commissioners.

By Chapter 67 of the Laws of 1786, the Commissioners were continued in office, and that act provides, among other things, for surveys of the unappropriated State lands by the Surveyor-General and for the sale of such lands under the direction of said Commissioners by the Surveyor-General, at public vendue, who is required to issue a certificate of sale to each purchaser, and that upon the production of such certificate with the State Treasurer's receipt in full payment of purchase price, the Commissioners of the Land Office are directed to issue letters-patent for the lands sold to the purchaser. This act also for the first time makes provision for the granting of lands under water in this State, by the following section:

“That it shall and may be lawful for the said commissioners to grant such and so much of the lands under the water of navigable rivers, as

See pages 273, 282, 284, 290, 295.

they shall deem necessary to promote the commerce of this State. Provided always that no such grant shall be made in pursuance of this act, to any person whatever, other than the proprietor or proprietors of the adjacent lands. And provided also, that every applicant for such grant shall previous to his or her application give notice thereof by advertisement to be published in one of the newspapers printed in this state for six weeks successively, and shall cause a copy of such advertisement to be put up at the court house of the county in which the lands lay so intended to be applied for, and if there be no court house in the county, then at such place as the said commissioners shall direct."

That act further provides:

"that all letters patent hereafter to be granted, shall be in such words and forms as the said commissioners shall direct and shall contain an exception and reservation, to the people of this state of all gold and silver mines, and shall vest the lands in fee simple."

Chapter 42 of the Laws of 1791 provides that the Governor shall issue letters-patent for certain waste and unappropriated State lands, in such form and words as the Commissioners of the Land Office shall direct, containing an exception and reservation of gold and silver mines to the people of this State.

The first water grant issued by the Commissioners of the Land Office appears to have been one dated December 29, 1786, to Ezra Read of a parcel of land under the water of the Hudson River adjacent and opposite to his land or farm within the limits of the city of Hudson "together with all and singular the rights, hereditaments and appurtenances to the same belonging or in anywise appertaining, to have and to hold the above described and granted premises unto the said Ezra Read, his heirs and assigns, as a good and indefeasible estate of inheritance forever," without exceptions, conditions or reservations of any kind whatsoever.

This form of grant was followed in all the years from 1786 down to the year 1831, with very infrequent conditions.

Chapter 69 of the Laws of 1801 continues as Commissioners of the Land Office, the Governor, Lieutenant-Governor, Speaker of the Assembly, Secretary of State, Attorney-General, Comptroller and Treasurer, and prescribes their powers and duties, in all respects similar to the former Act of 1786 as to the matters above noted.

By an act passed April 5, 1803 (3 Webster, 399), the Surveyor-General was added to the Land Commissioners, and it was provided that five of said Commissioners should constitute a quorum, that the Secretary of State shall convene the Board whenever necessary, that the Governor shall preside or in his absence a chairman may be appointed. "And be it further enacted that the consent and approbation of the person administering the government of this State, shall be and hereby is declared to be necessary in order to the validity of every act and proceeding of the said Land Office."

By an act passed April 9, 1805 (4 Webster, 250), the Deputy Secretary of State was declared to be clerk of the Board and that any three instead of five of the Commissioners, of which the Surveyor-General shall be one, shall constitute a quorum for the transaction of business. This act further provides:

"That the patentee or patentees of all patents hereafter to be issued for lands lying under water, shall cause to be paid before the same shall be issued, to the Secretary, the sum of five dollars for each grant, to be by the said Secretary accounted for, and paid into the treasury quarter yearly, with the other fees of his office."

The 15th section of an act passed April 3, 1807 (5 Webster, 125-130), reads as follows:

"And whereas for the purpose of duly regulating and constructing slips and *basons*, and for running out wharves and piers, it is essential that the right to the land under water below water mark, should be vested in the corporation of the city of New York.

"Be it therefore further enacted, that it shall and may be lawful for the commissioners of the land office, and they are hereby directed to issue letters patent, granting to the mayor, aldermen and commonalty of the city of New York, and their successors forever, all the right and title of the people of this state, to the lands covered with water, along the easterly shore of the North or Hudson's river, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, within the said city of New York at and from low water mark and running four hundred feet into the said river from Bestaver's Killetje or river, to the distance of four miles to the north along the easterly shore of the said North or Hudson's river; and also all the land covered with water, along the westerly shore of the East river or sound, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, at and from low water mark, and extending four hundred feet into the said river or sound, from the north side of Corlear's hook, at the

northerly boundary of the lands covered with water, whereof the said mayor, aldermen and commonalty are now seized, to the distance of two miles to the north, along the westerly shore of the said East river or sound: Provided always, that the proprietor or proprietors of the lands adjacent, shall have the pre-emptive right in all grants made by the corporation of the said city, of any lands under water granted to the said corporation by this act."

By an act passed April 7, 1807 (5 Webster, 233), the jurisdiction of said Commissioners was extended "to land under the water of Hudson River, adjacent to the State of New Jersey."

By an act passed March 24, 1809 (5 Webster, 473), the powers of said Commissioners were "extended to the waters adjacent to and surrounding Great Barn Island, in the City and County of New York, and also to the land between high and low water mark on said island: Provided, that no grant made in pursuance of this act shall infringe the rights of the Mayor, Aldermen and Commonalty of the City of New York; and provided, that the navigation of the waters surrounding the said island shall not be affected thereby."

By Chapter 11 of the Laws of 1814 (38th Session), passed October 21, 1814, the Governor was exempted from the duty of attending meetings of said Commissioners and the Lieutenant-Governor was authorized to act as chairman.

By Chapter 121 of the Laws of 1815, certain other Commissioners, consisting of the Governor, Lieutenant-Governor, Chancellor, Chief Justice of Supreme Court, Secretary of State, Attorney-General and Surveyor-General were authorized to cede to the United States lands and lands under water in Westchester county, in their opinion necessary for the defense and safety of the City and Port of New York.

By Chapter 199, Laws of 1815, the powers of said Commissioners of the Land Office were "extended to the lands under water on navigable lakes and to the lands under water adjacent to and surrounding Staten Island: Provided, that no grant to be made in pursuance hereof shall interfere with any rights of the corporation of the City of New York, nor extend more than five hundred feet into the water from low water mark."

By an act passed in 1820, page 95, the Commissioners of the Land Office were authorized to grant certain lands under water

in the city of Hudson to Robert Center and another, upon payment of the appraised value.

Chapter 30 of the Laws of 1824 provides as follows:

"That it shall and may be lawful for John M'Lallen, his heirs and assigns, to erect in the Cayuga lake, adjoining to his lands, on lot number ninety-nine, in the town of Covert, any wharf or wharves, store-house or store-houses, and to use, occupy and enjoy the same, as also the store-house heretofore erected by him in said lake, and adjoining said land, as fully and absolutely as if the same right had been vested in him by original patent from the state.

II. And be it further enacted, That it shall and may be lawful for the commissioners of the land office, to grant so much of the lands under the waters of the navigable lakes of this state, as they shall deem necessary to promote the commerce of the state, subject to the same conditions, restrictions and provisions, as are contained in the act, entitled 'An Act concerning the commissioners of the land office, and the sale of unappropriated lands,' passed April 6, 1813."

By Chapter 58 of the Laws of 1826, entitled "An Act relative to Improvements of the City of New York," it was provided:

"That it shall and may be lawful, for the commissioners of the land office, and they are hereby directed to issue letters patent, granting to the mayor, aldermen and commonalty of the city of New York, and their successors forever, all the right and title of the people of this state, to the lands covered with water along the easterly shore of the North or Hudson's river, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, within the said city of New York, at and from low water mark, and running four hundred feet into the said river, from a point on the easterly shore of said river, four miles north from Bestaver's Killitje, and extending therefrom north along the easterly shore of said river to Spytden Duyvel creek, otherwise called Kingsbridge creek or Harlaem river; and also all the land covered with water along the westerly shore of the East river or Sound, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, at and from low water mark, and extending four hundred feet into the said river or sound, from a point on the westerly shore of said river or sound, two miles north from Corlaer's Hook, and extending therefrom north along the westerly shore of the said East river or sound, to Spytden Duyvel creek, otherwise called Harlaem river: Provided always, That the proprietor or proprietors of the lands adjacent, shall have the pre-emptive right in all grants made by the corporation of the said city, of any lands under water granted to the said corporation by this act."

REVISED STATUTES, PART I, CHAPTER 9,
LAWS OF 1827.

TITLE V.

OF THE PUBLIC LANDS, AND THE SUPERINTENDENCE AND DIS-
POSITION THEREOF.

ARTICLE FIRST.

OF THE GENERAL POWERS AND DUTIES OF THE COMMISSIONERS
OF THE LAND OFFICE.

§ 1. The Commissioners of the Land Office shall have the general care and superintendence, of all lands belonging to this State, the superintendence whereof is not vested in some other officer or board. They shall also have power to direct the granting of the unappropriated lands of the State, according to the directions from time to time to be prescribed by law.

§ 2. All the powers now vested or hereafter to be vested in the Commissioners, may be executed by a majority of the board, or by any three of them, if the Surveyor-General be one of such three.

* * * * *

§ 4. The Deputy Secretary of State shall be clerk to the Commissioners, and shall enter the minutes of their proceedings in a book to be provided for the purpose, which shall be kept in the Secretary's office, in proper order, with the papers and documents which may be presented to the board.

§ 5. All letters-patent hereafter to be granted, shall be in such form as the Commissioners shall direct, and shall contain an exception and reservation to the people of this State, of all gold and silver mines.

ARTICLE FOURTH.

OF GRANTS OF LAND UNDER WATER.

§ 66. The Commissioners of the Land-Office shall have power to grant, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary, to promote the commerce of this State; but no such grant shall be made to any person, other

than the proprietor of the adjacent lands, and every such grant that shall be made to any other person, shall be void.

§ 67. The powers hereby vested in the said Commissioners, shall extend to lands under the water of Hudson's river, adjacent to the State of New Jersey; and also to lands under the waters adjacent to and surrounding Great Barn Island, in the city and county of New York; and to the land between high and low water mark on said island; but no grant shall be so made, as to interfere with the rights of the corporation of the City of New York, or to affect the navigation of the waters surrounding the said island.

§ 6. The powers of the Commissioners shall also extend to the lands under water, adjacent to and surrounding Staten Island; but no such grant shall be so made as to interfere with any rights of the corporation of the City of New York, or to extend more than five hundred feet into the water, from low water mark.

§ 69. Every applicant for a grant of land under water, shall, previous to his application, give notice thereof, by advertisement, to be published for six weeks successively, in a newspaper printed in the county in which the land so intended to be applied for, shall be situated; and shall cause a copy of such advertisement to be put up on the door of the court house of such county, and if there be no court house in the county, then at such places as the Commissioners shall direct.

§ 70. If there be no newspaper published in the county where such land shall lie, the advertisement shall be published in the newspaper that shall be printed nearest to such land.

CHAPTER 110.

LAWS OF 1827.

AN ACT in addition to the several Acts relating to the Powers and Duties of the Commissioners of the Land Office, and of the Comptroller.

Passed March 27, 1827.

1. Be it enacted by the People of the State of New York, represented in Senate and Assembly, That in all cases where grants of land have been directed to be made by the Commis-

sioners of the Land Office, upon the performance of any conditions by such grantees, and no time for the performance of such conditions has been prescribed by law, or by the terms of any agreement on the part of the State, it shall be lawful for the Commissioners of the Land Office to fix a reasonable time for the performance of such conditions, not less than one year, and to cause notice thereof to be inserted in the newspapers published by the printer to this State, for at least six weeks, and to transmit a copy of such notice to the persons interested, by mail; and if the said conditions shall not be performed, within the time so limited in such notice the person or persons entitled to any benefit under such grant shall forfeit all right and title in the premises.

At a meeting of the Land Board held November 21, 1831, Stephen Van Rensselaer applied for a water grant, and on motion of the Attorney-General a grant was ordered to be issued to him upon the express condition that if any part of the premises granted shall not within three years from the date of the patent be applied to the purposes of commerce by docking and filling in the same, then the grant and everything therein contained so far as relates to such part shall cease and be of no force or effect. Accordingly letters-patent were issued to Van Rensselaer, containing such a condition. (Book 25, Patents, page 562.)

At a meeting of the Board held February 13, 1832, the following form of letters-patent for all grants of land under water to be hereafter made was approved:

"KNOW YE, That for the purpose of promoting the Commerce of this State, and for no other object or purpose, whatsoever, and with the reservation and upon the conditions hereinafter mentioned, we have given, granted and confirmed and by these presents do give, grant and confirm unto.....all that piece or parcel of land under water situate....., together with all and singular the rights, hereditaments and appurtenances to the same belonging, excepting and reserving to ourselves, all gold and silver mines. And also excepting and reserving to all and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this grant not been made, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting docks and wharves thereon and filling in the same, to have and to hold the above described and granted premises, subject to the reservations aforesaid, unto the said....., his heirs and assigns forever. Provided nevertheless, and these presents are upon this express condition,

that if our said grantee, his heirs and assigns shall not within two years from the date hereof, actually appropriate and apply all and every part of the above described lands to the purpose of commerce, by erecting docks and wharves thereon, and filling in the same, then these presents and everything herein contained shall cease and determine so far as relates to any part of the granted premises which shall not have been so appropriated and applied."

This form of commerce grant remained in use until the year 1839, and during this period no grants of land were made for any other purpose than that of commerce.

By Chapter 238 of the Laws of 1833 and Chapter 298 of the Laws of 1834, the Land Board was authorized to extend certain water-patents in the Albany basin, at Albany.

Chapter 232 of the Laws of 1835, amended the Revised Statutes relative to grants of lands under water as follows:

CHAPTER 232.

LAWS OF 1835.

AN ACT to amend the Revised Statutes relative to Grants of Land Under Water. (Passed May 6, 1835.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. The powers conferred on the Commissioners of the Land Office by article fourth of title fifth, chapter ninth of part first of the Revised Statutes, are hereby extended to lands under water, and between high and low water mark, in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester lying on the East river or Long Island Sound; but no grant shall be made within the boundaries of the city of New York, or interfere with the rights of the corporation of said city.

§ 2. This act or the act referred to in the preceding section, shall confer upon the said Commissioners no other power than to authorize the erection of such dock or docks, as they shall deem necessary to promote the commerce of this State, and the collection of a reasonable and accustomed dockage from persons using such dock or docks, and the Legislature may at any time regulate the same in such manner as they shall think proper.

§ 3. So much of article fourth of title fifth of chapter ninth

of part first of the Revised Statutes as is inconsistent with this act is hereby repealed.

Chapter 380 of the Laws of 1839 authorized the Board to grant certain lands under water in South Bay in the city of Hudson to the Hudson & Berkshire Railroad Company, and section 2 of the act provides as follows:

“ § 2. Such grants shall be subject to all the provisions of the fourth article of the fifth title of the ninth chapter of the first part of the Revised Statutes, and to the general regulations of the commissioners of the land office; except that no further notice of any application to them shall be necessary, and except also that the time within which such grantees shall be required to appropriate and apply the granted premises to the purposes of commerce, by erecting docks and wharves thereon and filling in the same, shall not be restricted to a period less than ten years from and after the passage of this act.”

At a meeting of the Land Board held May 24, 1839, a resolution was adopted rescinding the resolution of February 13, 1832, as to form of water grants, and it was further resolved “that letters-patent granting lands under water in this State shall hereafter be in the following form:”

“KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the commerce of our said state and for no other object or purpose whatsoever and with the reservations and upon the conditions hereinafter mentioned, we have given and by these presents do give unto..... the power and authority to erect any dock or docks that shall be necessary to promote the commerce of our said state upon the land under water hereinafter described and the authority to collect reasonable and accustomed dockage from persons using such dock or docks, to wit: Excepting and reserving to all and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this authority not been given until the same shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks.”

This form continued in use until the year 1842, when on April 6th of that year the Land Board rescinded the resolution of May 24, 1839, and provided that “the following form be and the same is hereby adopted for all letters patent hereafter to be issued for granting leave to erect docks on lands under water in this State:”

“KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said

State and for no other object or purpose whatsoever and with the reservations and upon the conditions hereinafter mentioned, we have given and by these presents to give unto the....., the power and authority to erect any dock or docks than shall be necessary to promote the commerce of our said State, upon the land under water hereinafter described, and the authority to collect from persons using such dock or docks reasonable and accustomed dockage, to be regulated by our Legislature, to wit: Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said.....or their assigns shall not withinyears from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void."

This form was used from 1842 down to 1853 and the number of years inserted in the condition within which the patentee was to erect docks and fill in was for various periods of two, three, five, six and ten years, and occasionally the number of years was left unfilled in by a line drawn through the blank.

By Chapter 239 of the Laws of 1843, it was provided:

"§ 1, Samuel Browne and his heirs and assigns may erect, construct and maintain wharves, docks, bulkheads and piers on the land under water in front of his lands in the city of Brooklyn, and such land under water is hereby granted to him for the purpose aforesaid, with power to demand and receive reasonable dockage and wharfage from all persons using the same; but such docks, wharves and bulkheads, shall not extend into the East river beyond the permanent water line or line of bulkhead determined and established by the commissioners appointed under the second section of the act hereby amended, and pursuant to said act; and hereafter and from and after the passage of this act, the commissioners of the land office are hereby authorized to make grants of lands under water in front of lands in the city of Brooklyn, and extending in the East river to the said permanent water line or line of bulkhead, subject to the provisions of the fourth article of title fifth, chapter ninth, of the first part of the Revised Statutes.

§ 2. All the provisions of the third section of the act hereby amended are made applicable to this act."

Chapter 283 of the Laws of 1850 amended Sections 66 and 67 of Article IV, of the Revised Statutes of 1827, relating to grants of lands under water, to read as follows:

"§ 1. The commissioners of the land office shall have power to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void.

§ 2. The powers conferred on the commissioners of the land office by the first section of this act, are hereby extended to lands under water, and between high and low water mark in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester, lying on the East or Hudson river or Long Island sound; but no grant made under this act shall extend beyond any permanent exterior water line, established by law, and nothing contained in this act shall authorize the commissioners of the land office, to grant any lands under water belonging to the mayor, aldermen and commonalty of the city of New York, nor to interfere with any property, rights or franchises of said corporation of the city of New York, or interfere with the right of the Hudson river railroad company."

Chapter 288 of the Laws of 1851 authorized the Board to grant to the city of Oswego land under water in front of said city.

In pursuance of a resolution of the Land Board at a meeting held August 2, 1851, directing two water grants, "a form of description having been agreed upon and accepted by both parties, and the same being satisfactory to the Commissioners of the Land Office," grants were made to H. D. Talmage and John Schenck, *et al.*, of certain lands under water, in the following form:

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for the purpose of beneficial enjoyment by the grantees hereinafter named, their heirs and assigns of the land hereinafter described and with the reservation and upon the conditions hereinafter mentioned, we have given and by these presents do give unto..... the power and authority to erect any dock or docks that shall be necessary to promote the commerce of our said State, upon the land under water, hereinafter described and the authority to collect from persons using such dock or docks, reasonable and accustomed dockage, to be regulated by our Legislature, and we do also hereby grant unto said....., their heirs and assigns for the uses and purposes aforesaid, all our right, title and interest of, in and to the land under water or below high water mark.....

Excepting and reserving to all and every the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had its power and authority not been given

until the same shall have been actually appropriated and applied to the purposes of Commerce by erecting a dock or docks thereon or used for the purpose of beneficial enjoyment of the same by the grantees herein above named, their heirs or assigns, And these presents are upon the express condition that if the said grantees or their assigns shall not appropriate and apply the above described premises to the purposes of Commerce by erecting a dock or docks thereon and filling in the same or for the purpose of their beneficial enjoyment of the same, then these presents and everything herein contained shall cease, determine and become void."

This was a beneficial enjoyment grant.

The minutes of the meeting of the Land Board of June 12, 1852, show as follows:

"The title of lands under water shall be given to the riparian owners on the following general principles:

1. When the general line of the shore is parallel to the general line of the channel, then the division lines shall be laid down at right angles to the line of the channel.

2. Where the lines of the channel and of the shore are curving then the division lines shall be laid down giving a frontage on the channel in the proportion which the whole channel frontage bears to the whole shore frontage."

By resolution of the Board adopted July 23, 1853, the resolution of April 6, 1842, prescribing the form of letters-patent, was rescinded, and it was resolved "that the following form be and the same is hereby adopted for all letters-patent hereafter to be issued for granting leave to erect docks on lands under water in this State."

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State, and for no other object or purpose whatsoever, and with the reservation and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto....., his heirs and assigns, *the land under water and between high and low water mark* described as follows, to wit:..... Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that if the said....., or their assigns shall not within.....years from the date hereof actually appro-

priate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon and filling in the same, then these presents and everything herein contained, shall cease, determine and become void."

At a Land Board meeting, held March 16, 1854, "The Attorney-General submitted the following report: "

"The Attorney-General, to whom was referred the following Resolution of the Assembly, 'Resolved that the commissioners of the Land Office be requested to report at their earliest convenience whether in their opinion the second section of the act of April 10, 1850,' entitled 'An Act to amend the Revised Statutes, relating to grants under water,' repeals the prohibition contained in the act passed May 6, 1835, entitled 'An Act to amend the Revised Statutes relative to grants of land under water,' that no grant shall be made by the Commissioners of the Land Office within the boundaries of the City of New York, or if such prohibition has been repealed or amended by any other act of the Legislature of this State. By order, R. N. Sherman, Clerk, doth respectively report as follows:

"The first section of the act of May 6, 1835, after extending the powers of the Commissioners of the Land Office to certain lands adjacent to and surrounding Long Island, declares 'that no grant shall be made within the boundaries of the City of New York.' The question proposed is, 'Is this prohibition to make grants within the boundaries of the City of New York repealed by the second section of the act of April 10, 1850?'

"The act of 1835 confined the powers of the Commissioners to make such grants as they should deem necessary to promote the *commerce* of this state. The first section of the act of 1850 extends the power of the Commissioners to such grants as they shall deem necessary (not only) to promote the commerce of this state (but also) for the *beneficial enjoyment* of the same by the adjacent owner.

"If the Legislature believed that such extension of the powers of the Commissioners to grant for the beneficial enjoyment by the adjacent owner, was expedient and proper, such belief was of itself a sufficient reason for the passage of the act, without implying an intention on their part to repeal any portion of a pre-existing law. But, the second section of the Act of 1850, after extending the powers of the Commissioners 'to the lands under water and between high and low water mark in and adjacent to and surrounding Long Island and to all that part of the County of Westchester lying on the East or Hudson River or Long Island Sound,' declares that 'nothing contained in this act shall authorize the Commissioners of the Land Office to grant any lands under water belonging to the Mayor, Aldermen and Commonalty of the City of New York, nor to interfere with any property rights or franchises of said corporation of the City of New York, or interfere with the rights of the Hudson River Railroad Company.

"Is the prohibition clause of the Act of 1835, repealed by the Act

of 1850? It is not expressly repealed by any repealing word. If repealed at all, it must be only by implication. But the law is hostile to repeals by implication and requires that the language implying repeal should be clearly and palpably inconsistent with that of the original act. Is there such inconsistency or want of harmony in the language used in these two acts? May not they be blended and read in union? May not the two sections be read, as follows?—but no grant shall be made within the boundaries of the City of New York; and nothing contained in this act shall authorize the Commissioners of the Land Office to grant any lands under water belonging to the Mayor, Aldermen and Commonalty of the City of New York, nor to interfere with any property rights or franchises of said corporation of the City of New York, etc.

"In my judgment they may, and being not repealed by repealing words, nor by implication, there being no conflict or inconsistency between them, but the language of both harmoniously blending, I am of the opinion that it was not the intention of the Legislature by the second section of the act passed April 10, 1850, to repeal the prohibition contained in the first section of the act of May 6, 1835, and that the same is not repealed by that or by any other act of the Legislature of this state.

Respectfully submitted,

O. HOFFMAN, Attorney General."

Under a special resolution of the Land Board at a meeting held April 10, 1854, a further condition was imposed that the patentee should commence building the dock or docks within one year from the date of the patent.

At a Land Board meeting held September 28, 1854, "the Secretary of State presented a draft of rules for the direction of persons applying for grants of lands under water, which were adopted and ordered to be printed." (I am unable to find a copy of these rules.)

Between April 25, 1854, and December 24, 1855, the 1842 form of water grants was resumed, adding, however, after the word "legislature" in the first clause of the patent, the words "and we also give and grant unto the said, his heirs and assigns the land under water and between high and lower water mark described as follows:"

These grants generally contain conditions requiring the appropriation of the lands for the purposes of commerce within five years. Sometimes, however, they were for three, ten or years. No special order of the Land Board for the use of this form can be found.

Chapter 529 of the Laws of 1855 authorized a grant of land under water in Westchester county for the purpose of constructing a dock, in the following language:

"§ 1. Upon satisfactory proof being made to the commissioners of the land office that it will in no way unfavorably affect the navigation of the Harlem river, and that it will not be detrimental to the public interest, the said commissioners are hereby authorized and required to make a grant of land, under the waters of the Harlem river, to John Bussing, of Fordham, in the town of West Farms, in the county of Westchester, and his assigns, who are hereby authorized to build and construct a pier or dock of the width of not more than three rods, beginning at the end or termination of the public highway leading from Fordham, in the said town of West Farms, to Berrian's Landing near Kingsbridge, on the Harlem river, and extending into said river not over three hundred feet; said pier or dock to be used as a public pier or dock; and the said Bussing and his assigns are hereby authorized to charge and receive such rates of storage and dockage as shall be fixed by the county judge of Westchester county; said rates to be fixed on the first Monday of January next after the completion of said pier, and on the first Monday in January in every third year thereafter.

§ 2. This grant shall continue to the said Bussing and his assigns forever; subject, however, to the right of the town authorities of the town of West Farms, upon being authorized and directed by a majority of the electors thereof, voting by ballot at any regular town election, to purchase the said pier or dock, upon their paying to the said Bussing or his assigns, the cost of said pier or dock, with the interest thereon, to be computed at ten per cent. per annum, and upon the condition that the said pier or dock shall be perpetually maintained thereafter as a public pier or dock, for the free use of the people of said town."

In the early part of 1856, six commercial grants were made on the following form; although there was no apparent order of the Land Board, authorizing the use of this form:

"Know YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose, whatsoever, and with the reservation and upon the conditions hereinafter mentioned we have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water and between high and low water mark hereinafter described and also the power and authority to erect any dock or docks that shall be necessary to promote the Commerce of our State upon the same, and the authority to collect from persons using such dock or docks, reasonable and accustomed dockage, to be regulated by our Legislature, to wit:.....

Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner

as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said..... or their assigns shall not within..... years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained, shall cease, determine and become void."

From 1857 to 1869, commerce grants were made in the following form:

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State, and for no other object of purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:.....

Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said..... or their assigns shall not within.....years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained, shall cease, determine, and become void."

By resolution of the Land Board of November 7, 1857, the Attorney-General reported amendments to the usual form of letters-patent for grants of land under water, so that patents made out for beneficial enjoyment in the future shall be in the following form:

(Same as last above, excepting that in first paragraph after the words "Commerce of our said State," are interlined the words "or for the beneficial enjoyment of the land by the adjacent owner." And in the second clause, after the words "applied to the purposes of Commerce" are interlined the words "or for the beneficial enjoyment of the same by the adjacent owners," and the words "by erecting a dock or docks thereon," stricken out. After the words "premises to the purposes of Commerce" are interlined the words "or for the beneficial enjoyment of the same by the adjacent owner," and the words "by erecting a dock or docks thereon and filling in the same," stricken out. (.....years.)

This form was continued in use from 1857 to 1870, with the following exceptions: That on June 29, 1858, a grant was made for full beneficial enjoyment without any exceptions, reservations or conditions whatever to one, Charles T. Cromwell, and in 1869 a grant was made in the following form:

“KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of the beneficial enjoyment by the adjacent owner and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto..... his heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

Excepting and reserving to all and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce or for the beneficial enjoyment of the same by the adjacent owner by erecting a dock or bulkhead or filling in the same.”

Chapter 397 of the Laws of 1866 confirms a grant made by the Commissioners of the Land Office to Cheney Ames and his associates, of certain lands under water in the city of Oswego, under an act passed March 23, 1854, and it is provided:

“If said grantees or their assigns shall fail to build upon or in front of said land a pier or breakwater in addition to any built by the United States, within ten years from the passage of this act, the said land shall revert to the People of the State.”

Chapter 196 of the Laws of 1869 authorized the Land Board, whenever they have power to make a grant of land, summarily to inquire into the rights of any party thereto, upon such proof as by regulation they shall prescribe, “but this act shall not apply to grants of land under water.”

On February 11, 1870, the Land Board passed the following resolution:

“The Lieutenant-Governor presented the following Report:
To the Commissioners of the Land Office.

The undersigned, having been appointed a Committee to revise the rules and regulations of the Board governing applications for water grants and the form of water grant Patents, respectfully report that they recommend the adoption of the following resolutions:

I. RESOLVED, That the Resolution adopted by this Board September

28, 1854, be amended by adding after the word 'owner' where it first occurs, the words 'specifying which,' so that said Resolution will read as in the directions hereto annexed.

II. RESOLVED, That the Resolution adopted by this Board July 2, 1861, be and is hereby amended by inserting between the words 'Propriety of making such grant or grants' and the word 'and' the following: 'With their opinion whether such grant is necessary to promote the commerce of this State or for the beneficial enjoyment of the adjacent owner, or both. And no grant for beneficial enjoyment shall be made where the Board shall deem it necessary that a grant of such land should be made to promote the Commerce of this State,' so that said Resolution shall read as in the 'Directions' hereto annexed.

III. RESOLVED, That the form of Grants for the purpose of promoting Commerce, now in use, be continued without change or modification, which form is hereto annexed, marked 'A.'

IV. RESOLVED, That form of Grants for 'Beneficial Enjoyment' now in use be changed as follows—in the first line after the words 'Excepting and Reserving' insert next after the word 'Commerce' the words 'by erecting a dock or docks thereon' and strike out all after the word 'owner' in the next line to and including the word 'void,' so that such grant shall read as in the form of Grant hereto annexed, marked 'B.'

RESOLVED, That the Clerk of this Board be and he is hereby requested to cause to be printed the Rules and Regulations of the Board as amended.

All of which is respectfully submitted.

Feb. 9, 1870.

ALLEN C. BEACH,
VAN R. RICHMOND.

On motion, the Report was adopted, together with the Resolutions therein contained."

So that from 1870 to the year 1900 many grants of lands were made in the following form:

KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We, have given and granted and by these presents do give and grant unto....., their heirs and assigns, the land formerly under water, and between high and low water mark, described as follows:

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

Commerce grants were made from 1870 to 1887 in the following form:

KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, WE have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

(DESCRIPTION.)

EXCEPTING AND RESERVING to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon: And these presents are upon the EXPRESS CONDITION, that if the said....., his heirs or assigns, shall not, within five years from the date hereof, actually appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void."

Chapter 382 of the Laws of 1870, making further provisions for the government of the county of New York, prescribes as follows by Section 41:

" * * * The Commissioners of the Land Office are hereby authorized and directed to convey, by proper instruments in writing, necessary for the purpose, all the property, right title and interest of the People of the State of New York in and to the land under water used and taken by the said board for the construction of wharves, docks, piers, bulkheads, basins and slips under this act, whenever said commissioners may be required by said board to make such conveyance to the mayor, aldermen and commonalty of the city of New York."

By Chapter 625 of the Laws of 1881, Sections 1 and 2, it is provided:

"SECTION 1. All patents of lands heretofore issued pursuant to resolutions of the Commissioners of the Land Office, and sold by them at private sale to purchasers in good faith, purporting to convey the right, title and interest of the people of this State in and to any lands in this State, are hereby ratified and confirmed, to as full an extent as though the same had been sold at public auction, according to law; provided the same does not refer to any lands under water in the bay or harbor of New York or adjacent thereto.

§ 2. This act shall not be construed to affect any existing suit, or to impair, release or discharge any right, claim or interest of any person in and to said lands."

In the years 1886 and 1887 a few unconditional letters-patent were issued upon the advice of Attorney-General O'Brien, where the lands under water applied for had already been applied to purposes of commerce and were already filled in. (See Book 18 Patents, pages 138, 213, 296, 334 and 370.)

By Chapter 279 of the Laws of 1888,

"all the right, title and interest which the People of the State of New York have, if any, in and to the lands outside of and below low water mark under the waters of Huntington Bay, in the town of Huntington, Suffolk County, southerly of a line drawn from a granite monument now set near high water mark on the northerly point of Eaton's Neck and West of the United States Life Saving Station to a locust monument now set on Lloyd's Neck which line runs on a course S. 59° 20' 25" West and which is the line claimed by the trustees of the town of Huntington as the northerly line of their grants under Colonial patents, is hereby ceded to the present trustees of the town of Huntington, Suffolk County, and their successors in office, for the purpose of oyster cultivation. Provided nothing in this act shall be held to interfere with the rights and powers of the Commissioners of the Land Office to grant, all the right, title and interest of the State to lands under water in said bay, to the owners of adjacent uplands for purposes of commerce or beneficial enjoyment, and nothing, herein contained shall be construed as interfering with the rights of riparian owners. Subject, however and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid."

In 1887 and 1888 quit-claim letters-patent were issued to various individuals, containing the words "and these presents shall in no wise operate as a warranty of title," because certain towns who had remonstrated against the grants, claimed title under colonial grants to the lands under water, and it was deemed proper to make quit-claim grants so as to give the patentees a standing in court.

A grant made in 1891 to George Shields of property in Bath Beach, Kings county, contained the following unusual condition:

"Upon the express condition that the town of New Utrecht and the authorities thereof as well as the traveling public shall at all times have full power and free right of way and ingress to and egress from the waters of Gravesend Bay, over and upon 19th Avenue, whenever the same shall have been extended from Cropsy Avenue to said Bay, by

proper legal proceedings, and that the patentee, his heirs and assigns, shall not, at any time, erect, construct or cause to be erected or constructed, any gates, bars or other obstructions to prevent such passage, ingress or egress as aforesaid, or in any way or manner prevent the free and perfect use and connection by said avenue, when extended, with the water of said bay, and in case of such obstruction or violation of said conditions, this patent shall be null and void and the land hereby granted shall revert to and become vested in the People of the State of New York."

In 1871 a grant was made to the mayor, aldermen and commonalty of the City of New York of certain lands under the waters of the Hudson river in fee without conditions or reservations, under Chapter 137 of the Laws of 1870, and Chapter 574 of the Laws of 1871.

In 1879 another grant was made in fee to the mayor, aldermen and commonalty of the City of New York to lands under the waters of Lake Mahopac, Putnam county, under Chapter 445 of the Laws of 1877, and in 1888 a grant was made to the mayor, aldermen and commonalty of the City of New York under Chapter 410 of the Laws of 1882 in fee for the construction of wharves, docks, piers, bulk-heads, basins, slips and streets for public use, and for no other objects and purposes whatever, all the right, title and interest of the people in certain lands under water of Long Island Sound, Bronx Kills, Harlem River, Cromwell's Creek, Spuyten Duyvil Creek and the Hudson River, with certain exceptions.

On February 13, 1892, Attorney-General Rosendale made the following report to the Land Board in the matter of the application of the Rockaway Park Improvement Company:

"In the matter of the application of The Rockaway Park Improvement Company for correction of letters-patent heretofore issued to said Company, which said application was referred to me, together with the general question as to a revision of the form of patents 'for beneficial enjoyment' I have the honor to report as follows:

The correction applied for is to erase from the letters-patent the following clause: 'Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent

owner.' The petitioner asks that the amended letters-patent shall be without limitation of any kind or in any event, beyond a provision that the title shall become absolute when the lands granted have been appropriated and applied for the beneficial enjoyment of the same by the grantee.

Authority is given to your Honorable Board to make corrections in letters-patent in case of manifest error, by the provisions of chapter 605 of the Laws of 1881.

The particular grant in question to the petitioner, was made on the 11th of February, 1890, the Attorney General certifying that the application was made in proper form, the State Engineer and Surveyor reporting that the grant would not interfere with navigation, and the Comptroller reporting that an appraisal had been made valuing the land at \$1,015.97; upon which reports the Board directed the grant to be made upon the payment of the said appraised value, together with the sum of \$54.20, appraiser's fee and expenses. See proceedings of Commissioners of the Land Office, of 1890, pages 65 and 66.

The application was for 'beneficial enjoyment,' the grant was directed to be made 'for beneficial enjoyment,' and the full appraised value of the land was paid.

My learned predecessor was at one time called upon for an interpretation of the meaning of the words 'for beneficial enjoyment' as used in the statute, and in an opinion dated September 11th, 1891, he employed the following language:

'By section 67, Vol. 1, of the Revised Statutes, First Edition, page 208, part 1, chapter 9, title 5, article 4, "the Commissioners shall have **power to grant** so much of the lands under the waters of the navigable rivers and lakes as they shall deem necessary to promote the commerce of the State."

'This statute was amended in 1835, chapter 232, section 2 of said act provided that the Revised Statutes, *supra*, or this act shall confer "no other power upon the commissioners than to authorize the erection of such dock or docks as they shall deem necessary to promote the commerce of the state, and the collection of reasonable and accustomed dockage from persons using such dock or docks, and the legislature may at any time regulate the same, as they shall think proper."

'It would appear that under the conditions of the statute, a grant by the Commissioners of the Land Office for commercial purposes would only authorize the erection of docks on the land granted in such number or style as would promote the commerce of the State, authorizing the grantee to collect reasonable dockage from persons using the docks, the power always remaining in the legislature to regulate the same. By the amendment of section 67, R. S., *supra*, in 1850, chapter 283, which conferred power upon the Land Board to make grants "for beneficial enjoyment," the legislature assumed that grants for purposes of commerce were of a limited character and subject to legislative control. On the other hand, a grant for "beneficial enjoyment" to a grantee, his heirs and assigns, imports a fee, and I think the Legislature by said amendment of 1850 when it authorized the Land Board to make grants for beneficial enjoyment, intended a fee should be conveyed where the land applied

for was not necessary for purposes of commerce. (See Resolution adopted by Land Office, March 6th, 1872.)

'The practice of the Land Board in fixing the consideration of these grants has been uniform. In the cases of grants for commerce, only a nominal sum has been charged, whereas in grants for beneficial enjoyment the full appraisal value has been required.'

Without expressing opinion as to the proper construction and meaning of the clause in the particular Patent complained of and sought to be eliminated, it would seem to me that the petitioner should have the relief applied for. The clause can have no place or purpose in the letters-patent, except as a limitation of the grant, and any such limitation is inconsistent with the purpose of the grant.

The lands were applied for, the matter considered by the Board, the valuation made by the appraiser, and payment made by the applicant of the full appraised value, all on the theory that a fee was to be obtained.

I would therefore recommend that the prayer of the petitioner in this matter be granted, and that on surrender and cancellation of the letters-patent issued to it under the resolution of February 11th, 1890, quit-claim letters-patent be issued to said The Rockaway Park Improvement Company for the same premises, but without any limitation or restriction other than a statement that said grant is made 'for the beneficial enjoyment of the adjacent owner' according to the provisions of law; and I would further recommend that all future grants 'for beneficial enjoyment' made in consideration of the payment as purchase price of the full appraised value of the premises, be made in similar manner and form.

(Signed) S. W. ROSENDALE,
Attorney General."

And by resolution of the Land Board on February 25, 1892, new letters-patent were issued to said company without any limitation or restriction other than the statement that said grant was made "for the beneficial enjoyment of the adjacent owners."

The following new form of beneficial enjoyment grant was used from March, 1892, to May 31, 1894:

"WHEREAS, the grantee hereinafter named, being the owner of, the uplands adjacent to the lands hereinafter described, has made application to the Commissioners of the Land Office, pursuant to law and the statutes in such case made and provided, for a grant of the lands hereinafter described for the beneficial enjoyment thereof by the adjacent owner, KNOW YE, that, pursuant to a resolution of the said Commissioners of our Land Office, adopted 189..., we have given and granted and by these presents do give and grant unto his heirs and assigns, the land under water and between high and low water mark, described as follows:, for the beneficial enjoyment of the same by the said adjacent owner, pursuant to the statutes in such case made and provided."

The Land Board in 1894 passed the following resolutions:

“The following rules and regulations governing applications for grants of land under water were presented:

RULES AND REGULATIONS OF THE COMMISSIONERS OF THE LAND OFFICE
GOVERNING APPLICATIONS FOR GRANTS OF LANDS UNDER WATER.

Resolved 1. That no grants of land under water be hereafter made unless the applicant make affidavit that he intends forthwith to appropriate the lands applied for to the purposes of commerce, by erecting thereon a public dock or docks, or that the land is proper for the purpose of beneficial enjoyment of the owner, specifying *which*, and stating *in what manner* the said enjoyment will be beneficial, and shall also produce an affidavit from the first judge of the county, or the supervisor and town clerk, or two of the assessors of the town in which such lands are situate, stating that the lands applied for are not more than are necessary for the purposes aforesaid and that they believe that it is the *bona fide* intention of the applicant to appropriate the said lands to the purposes of commerce by erecting thereon a public dock or docks, or that they believe that the land is proper for the purpose of the beneficial enjoyment of the same by the owner, and stating the manner in which said enjoyment will be beneficial.

2. That this Board will not act on any application for lands under water unless the same be accompanied with accurate maps of the lands applied for, as hereinafter provided, and by a full and accurate description of the same.

3. That no grants for beneficial enjoyment shall be made when the Board shall deem it necessary that the grant of such lands should be made to promote the commerce of the State.

4. That the minimum sum to be charged to the patentee, in each case of a grant of land under water, be fixed at fifty dollars, in addition to the patent fee of five dollars, for each separate parcel of land under water applied for.

5. That all applications made to this Board for grants of land under water for beneficial enjoyment shall be referred to the Comptroller, under whose direction the value of the lands or privileges applied for shall be appraised by a duly sworn appraiser of the Board, and that the patent shall issue only on payment of the value so reported or such sum as the Board shall, under all circumstances, deem reasonable.

6. That letters-patent for the purposes of beneficial enjoyment shall be of two distinct forms, to be known as ‘full’ and ‘restricted.’ (See blank Patents hereunto annexed.) And appraisals of land to which letters-patent of the full form are desired shall be for the full value of such property, while in case of restricted grants, the diminution of the value of the grant to the applicant, by reason of the restrictions imposed, is to be considered in said appraisal.

7. That if, for good and sufficient reasons, a grantee for the purposes of commerce has been unable to comply with the conditions of the letters-patent, he may file with the Commissioners a verified petition, praying that he be granted an extension of not more than three years, within which to comply with the said conditions; but no such prayer shall be

granted unless it shall appear that said grantee has actually begun the erection of a public dock or docks, and intends in good faith to complete the same, and his petition must be presented before the expiration of five years from the date of his patent.

8. That in no case will a further extension of time within which to comply with conditions of letters-patent be granted.

9. That all notices of applications for grants of land under water shall state that any person deeming himself liable to injury by reason of such grant may file with the Commissioners of the Land Office a remonstrance, stating why said grant will be an injury to him or his property, and that said remonstrance should be filed on or before the filing of the application.

10. That all letters-patent shall conform to the blank forms hereunto annexed.

11. That the following requirements must be strictly observed in making applications and that all affidavits must be made upon the blanks hereunto annexed.

FORM FOR PURPOSES OF COMMERCE.

(This form has been continued and is in present use, 1911.)

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD,
FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to resolution of the Commissioners of our Land Office, dated the day of , 189 , and for the purposes of promoting the commerce of our said State, by the building upon the premises hereinafter conveyed, of a public dock or docks by the owner or owners of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned we have given and granted and by these presents do give and grant unto heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

And, these presents are upon the express condition that the said grantee, shall acquire no right, title or interest in or to the above described premises, unless within five years from the date of these presents, he shall actually appropriate said premises above described to the purposes of commerce by erecting thereon a public dock or docks, and that all of the right, title and interest in and to so much of the above-described premises as are not actually occupied and covered by said dock or docks and their necessary approaches, shall remain in the said people in the same manner as if these presents had not been granted, anything herein to the contrary notwithstanding.

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our State to be hereunto affixed.

Witness, Governor of our said State, at our city of

Albany, the day of in the year of

our Lord one thousand eight hundred and ninety-

Passed the Secretary's office the day of 189 .

.....
Deputy Secretary of State.

FORM FOR FULL AND BENEFICIAL ENJOYMENT.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD,
FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of , 189 , we have given and granted, and by these presents do give and grant unto , heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said State, to be hereunto affixed.
Witness, Governor of our said State at our city of Albany,
the day of in the year of our Lord, one thousand eight hundred and ninety-
Passed the Secretary's office the day of 189 .

.....
Deputy Secretary of State.

FORM FOR RESTRICTED BENEFICIAL ENJOYMENT.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD,
FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of , 189 , and for the purpose of granting and conveying a restricted beneficial enjoyment in and to the lands under water and between high and low water mark hereinafter described, to the owner of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter expressed, we have given and granted, and by these presents do give and grant unto heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

Excepting and reserving to all and every, the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above-described premises in as ample a manner as they might have done had this power and authority not been given, always excepting such parts thereof as are actually occupied and covered by structures, docks or buildings of a permanent character, and such parts of said premises as have been actually filled in and reclaimed from low or marsh land, or have been inclosed by a sea wall.

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said State to be hereunto affixed.
Witness, Governor of our said State, at our city of Albany,
the day of in the year of our Lord one thousand eight hundred and ninety-
Passed the Secretary's office the day of 189 .

.....
Deputy Secretary of State.

On motion of the TREASURER the above resolution and forms of patents were adopted and the Clerk of this Board was directed to prepare, under direction of the Attorney-General, regulations to conform to the new patents."

The Public Lands Law, constituting Chapter 11 of the General Laws became Chapter 317 of the Laws of 1894. By Section 9, the Commissioners of the Land Office were authorized to summarily inquire into the rights of applicants for grants of lands under water. Section 11 confirmed all letters-patent issued prior to July 11, 1881, except lands under water in New York bay or harbor, or adjacent thereto, and Sections 70 and 71 authorized the continued grants of lands under water, as follows:

"Section 70. GRANTS OF LAND UNDER WATER.—This section authorizes grants of land under water.

1. Of navigable rivers.

2. Of the Hudson river adjacent to the state of New Jersey.

3. Adjacent to and surrounding Great Barn Island in the city and county of New York, and between high and low-water mark in such island, but not so as to affect the navigation of the waters surrounding such island.

4. Adjacent to and surrounding Staten Island, but not so as to extend more than five hundred feet into the water from low-water mark on said island, except where the legally established pier and bulkhead lines extend more than five hundred feet beyond low-water mark, in which case grants may be made to such lines.

5. Between high and low-water mark, in and adjacent to and surrounding Long Island, and all that part of the former or present county of Westchester lying on the East river or Long Island sound, but not beyond any permanent exterior water line established by law.

6. The commissioners of the land office may grant in perpetuity or otherwise, to the owners of the lands adjacent to the lands under water specified in this section, to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners, so much of said lands under water as they deem necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person shall be void. No such grant shall be made of any lands belonging to the city of New York, or so as to interfere with the rights of that city or of the Hudson river railroad company, or of its successor the New York Central and Hudson River Railroad Company.

§ 71. NOTICE OF APPLICATION THEREFOR.—Every applicant for a grant of land under water shall, previous to his application, cause notice thereof to be published at least once a week for six weeks, successively, in a newspaper printed in the county in which the land so intended to be applied for is situated; and a copy of such notice to be posted for the same period upon the door of the court house of such county, and

if there be no court house in the county, at such place as the commissioners direct."

Section 70 of the Public Lands Law was amended by Chapter 208 of the Laws of 1895 by adding to its first subdivision thereof the words "and lakes" so as to authorize grants of lands under the waters of navigable rivers and lakes. Subdivision 5 was amended by striking out the words at the beginning of the paragraph "between high and low-water mark, in and"; and also by adding after the words "to promote the commerce of this State or for the purpose of beneficial enjoyment thereof for such owners," the words "or for agricultural purposes"; and at the end of Subdivision 5 was inserted a new paragraph, reading as follows:

"In addition to the foregoing, the commissioners of the land office may authorize the use of lands of the State under water, for the purpose of improvement of navigation when the same is carried on by the federal or State government; but private rights or rights of property of individuals, if any, of any nature or description, shall not be taken away nor impaired nor impeded without due process of law."

Chapter 898 of the Laws of 1895, which was "an act to establish the pier and bulkhead lines around Staten Island, as authorized by act of congress of August eleventh, eighteen hundred and eighty-eight," provided as follows:

"Section 1. The pier and bulkhead lines around the entire shores of Staten Island, as proposed by the board of engineers appointed for the establishment of the harbor lines of New York harbor and its adjacent waters by special order number forty-nine, dated war department, October fifth, eighteen hundred and eighty-eight in accordance with section twelve of act of congress of August eleventh, eighteen hundred and eighty-eight, approved by the secretary of war, June twenty-first, eighteen hundred and eighty-nine, January fourth, eighteen hundred and ninety, March fourth, eighteen hundred and ninety, July twenty-sixth, eighteen hundred and ninety, and August ninth, eighteen hundred and ninety-two, as said pier and bulkhead lines are delineated on the maps filed in the Secretary of State's office in Albany, are hereby established and confirmed.

§ 2. It shall be lawful for the owners of piers and bulkheads constructed or hereafter to be constructed, or the owners of land under water granted by the State of New York on the Staten Island side of the harbor of New York, to extend or construct piers not exceeding one hundred and fifty feet in width, with spaces between the same of at least one hundred feet, and bulkheads to the exterior bulkheads and pier lines respectively fixed and established by this act; provided, that grants of any land under water not heretofore granted to the riparian owners which it is necessary

to occupy in the construction of said piers and bulkheads, be first obtained from the commissioners of the land office, in accordance with law and upon the payment of such compensation to the State as they may fix and determine; and provided, that no such grant shall be made by the commissioners of the land office except to the owner of the adjacent upland where no previous water grant has been made, and to the owner of the land under water within the water lines established before the passage of this act where such water grant has been made; and provided, that no pier shall be built under the provisions of this act by any water-front owner which encroaches upon land under water not owned by him."

By the Charter of the City of New York, Chapter 378 of the Laws of 1897, certain lands under water were granted to the City of New York by Sections 83 to 86, reading as follows:

"TITLE 2.

Grants of Lands and Franchises to City in Aid of Commerce.

GRANTS OF LAND UNDER WATER.

Section 83. To the end that the city of New York, as herein constituted, may be enabled to make needful provisions for the navigation, intercourse and commerce of the city and adequately to develop and secure the same now and in the future, the said city shall have the control as herein and in this act provided, of the water front of the entire city, subject, however, to the rights of private owners of property, and also power to establish, construct, acquire, own, maintain and enjoy all ferries, public wharves, docks, piers, bulkheads, basins, slips, streets, approaches and spaces, and all other public structures, adjuncts and facilities necessary or proper for the navigation, intercourse and commerce, foreign and domestic, of the city. To these ends, in addition to all other grants, there is hereby granted in fee to the said city of New York, as herein constituted, in all the public streams, rivers, sounds, bays and waters of all descriptions at any and all places within said city or adjoining the limits of said city as herein constituted, all and singular the property, estate, right, title and interest of the people of the state of New York, in, to, of, and concerning such lands and soil covered by water, as are embraced within the projected boundary lines of any street intersecting the shore line, and which street is in public use or which may be hereafter opened for public use, extending from highwater out into said streams, rivers, sounds, bays and waters so far (any limits in existing grants to the contrary) as the said city shall now or at any time hereafter in the opinion of its municipal assembly, or department of docks and ferries require the same for ferries, public wharves, docks, piers, bulkheads, basins, slips, or other public structures, adjuncts and facilities for navigation and commerce, including the right for such purposes to reclaim such lands from said waters, and including also all riparian rights, and all rents, issues and profits of the

premises herein granted. The commissioners of the land office shall from time to time convey or patent the lands herein granted to the city for said purposes as and whenever required by the board of docks.

PROPERTY AND FRANCHISES INALIENABLE.

§ 84. The property, franchises and rights hereby granted and the works and structures hereby authorized are not the subject of sale but shall be held by the city in perpetuity. But this shall not prevent the city from leasing the same for limited periods of time, in the same manner as it leases other like property.

PRIVATE RIGHTS PROTECTED.

§ 85. This grant shall not impair or affect any existing valid private rights, or the existing riparian rights of owners of private property, or the lawful rights of private owners of docks, piers and other structures in the said city or any part thereof.

PATENTING OF LANDS UNDER WATER BY COMMISSIONERS OF THE LAND OFFICE.

§ 86. After the approval of this act no patent of soil or land under water within The City of New York, as herein constituted, shall be made except to The City of New York or to the riparian proprietor. If the board of docks with the approval of the commissioners of the sinking fund, shall project a plan or plans for the construction of docks between street intersections as aforesaid, and desire a grant of land under water for that purpose, they shall make application therefor to the commissioners of the land office, who thereupon shall give notice to the riparian proprietor before taking action in the matter and shall make such grant to the city for the purposes specified in section eighty-three. Such grant, however, shall be subject to all the rights of the riparian proprietor, and before the city shall construct such public wharves or other structures in front of the land of such riparian proprietor, the city shall make just compensation to such proprietor for the value of all the riparian rights. If the commissioners shall make a grant to the riparian proprietor it shall be confined to soil or land under water in front of the land of such riparian proprietor. If application be made to the commissioners of the land office by the riparian proprietor for a grant of soil or land under water within The City of New York, as herein constituted, said commissioners shall give notice thereof to the board of docks of the city, which shall examine into such application and determine whether the granting of the same will conflict with the rights of the city under this act or be otherwise injurious to the public interests of the said city, and shall report their conclusions to said commissioners, who shall insert such terms and conditions in the grant recommended by the board of docks as will protect the public interests of the city in respect to navigation and commerce. The validity of any such grant or patent may be judicially determined in an action brought by and in the name of the city."

By the amendment of the Greater New York Charter, Chapter 466 of the Laws of 1901, the above sections were slightly amended.

The forms heretofore described were continued in use until December 7, 1899, when the full beneficial enjoyment grant was abolished (see Land Board Minutes 1899, page 187, etc.), upon the report of Secretary of State McDonough, in which he claimed that the Land Board was unauthorized in making such full beneficial enjoyment grants, urging that the lands under water belonging to the State were held by the State in trust for the public and not for any other purposes, and that grants should not be made except for public or quasi-public purposes.

The Land Board at a meeting held March 1, 1900, adopted a resolution and made several grants to contain the following exceptions and reservations:

"Excepting and reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks or other improvements of a substantial character thereon, or for the beneficial enjoyment of the same by the adjacent owner; provided that unless the fulfilment of the purposes set forth in the application and the grant be entered upon in good faith within five years, this grant be null and void."

Another special form for a grant of this kind was made to the Astoria Light, Heat and Power Company in 1899, somewhat similar in form to the last above.

The Land Board on April 5, 1900, adopted a new form of restricted beneficial enjoyment grant, as follows: (See Land Board Minutes, 1900, page 81.)

"On motion of the Speaker the following resolution was adopted:

Resolved, That the form of letters-patent for restricted beneficial enjoyment water grants adopted by the Commissioners of the Land Office June 28, 1894, be and the same is hereby abolished, and that the following form be adopted:

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD,
FREE AND INDEPENDENT.

To all to Whom these presents shall Come, Greeting:

Know Ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of 190 , and for the purpose

of granting and conveying a restricted beneficial enjoyment in and to the lands under water and between high and low water mark herein-after described, to _____ the owner of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter expressed, we have given and granted, and by these presents do give and grant unto _____ heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

These letters patent are issued pursuant to a resolution of the Commissioners of the Land Office for the following purposes, to wit:

Excepting and reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, always excepting such parts thereof as are actually occupied and covered by structures, docks or buildings of a substantial character and such parts of said premises as have been actually filled in and reclaimed from low or marsh land; provided that unless the improvements above named are completed within five years from the date of these presents this grant shall cease and determine and become null and void.

In Witness Whereof, We have caused these our Letters be made Patent, and the Great Seal of our said State to be hereunto affixed. Witness, Governor of our said State, at our City of Albany, the _____ day of _____ in the year of our Lord one thousand nine hundred. Passed the Secretary's office the _____ day of _____ 189 .

.....
Deputy Secretary of State.

This form is still in use. The time within which the improvements are required to be made, during the past ten years, has uniformly been five years, except in cases of extensions, where the period of improvement has almost uniformly been three years.

In March, 1902, letters-patent were issued to the New York Dock Company, containing the following clause:

"These letters-patent are issued, however, subject to such right, title, and interest as the city of New York has under the provisions of its charter to lands under water in front of projected streets, if any such there be, and such right, title and interest, if any, are excepted from this grant and reserved to said city."

And since that time all grants of lands under water in the City of New York have contained this clause.

On September 19, 1902, at the request of the Commissioner of Docks and Ferries of the City of New York, the Board decided that thereafter all grants of lands under water in the City of

New York should contain the following conditions: (See minutes of Commissioners of Land Office for 1902, pages 152 and 213.)

"This grant is made and accepted upon the express covenant, terms and conditions, that The City of New York may at any time hereafter acquire title to the premises herein granted, upon paying to the patentee, his heirs, successors or assigns, the amount paid by such patentee to the State for said premises, together with the value of the improvements thereon, or may acquire title to a part or a portion of said premises, upon paying to the patentee, his heirs, successors or assigns, the proportionate share of the amount paid by such patentee to the State for such part or portion, together with the value of the improvements on the portion thereof required at the time The City of New York shall acquire title to the same, and also all damages, if any there be, to the improvements upon such part of the premises herein granted not acquired by The City of New York, as shall be occasioned by the division of the herein granted premises, and that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York."

The only grants that have been made since that time of lands under water in the City of New York not containing the above or similar conditions have been certain renewals of previous grants and certain grants in 1909 and 1910 under the water of Jamaica bay. The form of conditions above mentioned for grants of land under water was changed in the year 1903 to read as follows:

"These letters-patent are issued, however, subject to such right, title and interest as The City of New York has under the provisions of its charter to lands under water in front of projected streets, if any such there be, and such rights, title and interest, if any, are excepted from this grant and reserved to said city.

This grant is made and accepted upon the express covenant, terms and conditions that The City of New York may at any time hereafter acquire the interest in the premises herein described, which the patentee may have acquired under or by virtue of this patent, upon paying to the patentee, his heirs, successors or assigns the amount paid by said patentee to the State for the said interest in said premises, together with the expenses necessarily incurred by the patentee for the acquiring of such patent, which are hereby fixed at the sum of \$350, and also the value of the improvements on said premises; or may acquire the interest acquired under this patent to a part or a portion of said premises upon paying to the patentee, his heirs, successors or assigns the proportionate share of the amount paid by such patentee to the State for such interest in part or portion and a proportionate part of the said expenses, together

with the value of the improvements on the portion thereof acquired at the time The City of New York shall acquire title to such interest, and also all damages, if any there be, to the improvements upon such part of the premises herein described not acquired by The City of New York as shall be occasioned by the division of the herein described premises. And that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York.

And it is further covenanted and agreed in case of a violation or breach of the foregoing covenants, terms and conditions in any manner on the part of the said grantee, his heirs or assigns, then the estate hereby granted shall terminate and these letters-patent shall become null and void, and the people of the State of New York may re-enter into and become possessed of said premises hereby granted and every part and parcel thereof."

(See Land Board Minutes for 1903, pages 48, 80 and 212 to 216; also Land Board Minutes for 1904, pages 99, 110, 120; and Land Board Minutes for 1905, page 177.)

By resolution of the Land Board on June 28, 1906 (see Land Board Minutes for 1906, page 155), it was resolved that all new grants of lands under water outside of the City of New York should contain the following reservation:

"These letters patent are issued, however, subject to such right, title and interest as the town (city or village) of has to lands under water in front of projected streets, if any there be, and such right, title and interest, if any, are excepted from this grant and reserved to the town (city or village)."

Since May 9, 1911, the place of residence of grantees is also inserted in every water grant.

Water grants are now made under the provisions of the present Public Lands Law, being Chapter 50 of the Laws of 1909. Article VI. of this Act, by Section 75, authorizes grants of lands under water in the same language as Section 70 of Chapter 317 of the Laws of 1894 as amended by Chapter 208 of the Laws of 1895, and Section 76 provides for publication of notice of application in the same words as Section 71 of Chapter 317 of the Laws of 1894. Section 110 of Chapter 50 of the Laws of 1909 provides:

"This chapter shall not limit or modify the provisions of the Railroad Law relating to the grant or acquisition, for railroad purposes, of any land belonging to the People of the State."

WATER GRANTS UNDER RAILROAD LAW.

Grants of lands under water in addition to those directed by the Public Lands Law have been authorized under the Railroad Law to railroad corporations. Section 25 of the Railroad Law of 1850, Chapter 140, reads as follows:

"§ 25. The commissioners of the land office shall have power to grant to any railroad company formed under this act, any land belonging to the people of this state, which may be required for the purpose of their road, on such terms as may be agreed on by them; or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purpose of the road, the county or town officers having the charge of such land may grant such land to such company, for such compensation as may be agreed upon."

Chapter 148 of the Laws of 1881 provides as follows:

"Section 1. The commissioners of the land office shall have the power to grant to any railroad company formed under the laws of this state any right of way which may be required for the purposes of its road, not exceeding thirty feet in width at grade of road with such additional width as may be required at cuttings or embankments over or across any lands in Richmond county, belonging to the people of the state, including such as are used or occupied by the commissioners of quarantine, the health officer for the port of New York, the trustees of the seamen's fund and retreat in the city of New York, on such terms as may be agreed on by them, or such company may acquire title to such right of way by appraisal, in the same manner as is provided by law for acquiring title for railroad purposes to lands owned by individuals."

The Law of 1850 was amended by Chapter 601 of the Laws of 1886 by exempting lands included in the State Reservation at Niagara and the Concourse Lands at Coney Island from the provisions of Section 25.

The Railroad Law of 1890, Chapter 565, by Section 8, provides as follows:

"§ 8. RAILROADS THROUGH PUBLIC LANDS.—The commissioners of the land office may grant to any domestic railroad corporations any land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be acquired for the purposes of its road on such terms as may be agreed on by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purpose of its road, may grant such land to the corporation for such compensation as may be agreed upon."

This was amended by Chapter 313 of the Laws of 1904 by providing that in case the land sought to be acquired by the railroad corporation is used for prison purposes, the approval of the Superintendent of State Prisons must also be had; and the present Railroad Law, Chapter 481 of the Laws of 1910, by Section 18 reenacts the provisions of Chapter 313 of the Laws of 1904.

Chapter 568 of the Laws of 1909 granted certain lands under water at Jamaica Bay in the City of New York. This act provides as follows:

"Section 1. To the end that The City of New York may cooperate with the federal government in the creation of a new harbor in and about Jamaica bay, including the making of channels, basins, slips and other necessary adjuncts, through the excavation of the soil or lands under water, and otherwise intended for the advancement of the commercial interests of the city, state and nation, there is hereby granted for the purposes specified in this act, to the city of New York, such right, title and interest as the state of New York may have in and to the land under water in Jamaica bay and Rockaway inlet and the tributaries thereto which lie to the northward of latitude forty degrees thirty-three minutes north, and to the eastward of longitude seventy-three degrees fifty-six minutes west, as now interpreted, excluding, however, all lands under water included within the boundary of Nassau county. This grant shall become operative upon the United States government making its first appropriation for the creation of the new harbor mentioned in this act, or upon the city of New York appropriating and setting aside a sum not less than one million dollars for the same purpose.

§ 2. The grant shall not affect such land as may hereafter be granted by the commissioners of the land office under any application made prior to May twenty-ninth, nineteen hundred and nine, but if any such application be denied, the land covered thereby shall pass to the city of New York under the conditions of this act."

RAILROAD TUNNELS UNDER EAST AND NORTH RIVERS.

The first grants of lands under water around Manhattan Island for the purpose of constructing tunnels appear to have been two made in the year 1891 (see Book 47 Patents, pages 564-565). They were made to the New York and Long Island Railroad Company and the Hudson River Tunnel Company under Chapter 140 of the Laws of 1850 and Chapter 601 of the Laws of 1886, granting rights of way under the East River between New York City and Hunters Point, and New York City and Jersey City, for the construction of tunnels for railroad purposes.

Section 4 of Chapter 4 of the Laws of 1891, creating the Rapid Transit Commissioners in the City of New York, was amended by Section 1 of Chapter 616 of the Laws of 1900 by providing: "It shall be lawful for said Commissioners to locate the route of any railway or railways, by tunnel under any such public parks, lands, places, *rivers or waters*." This was amended by Section 1 of Chapter 564 of the Laws of 1904 to provide that "the said board, from time to time, may locate the route or routes of such railway or railways over, under, upon, through and across any streets, avenues, bridges, viaducts, '*rivers, waters and lands within such city*.'" (See also Section 1 of Chapter 498, Laws of 1909.)

Section 32 of Chapter 4 of the Laws of 1891 was amended by Section 3 of Chapter 472 of the Laws of 1906 to read as follows:

"§ 32. The said board of rapid transit railroad commissioners may also from time to time, as in this section hereinafter provided, with the approval of the board of estimate and apportionment, or other analogous local authority of such city, grant a right or rights, franchise or franchises or enter into a contract or contracts, upon application to said board of any railroad corporation, now or hereafter incorporated, for the purpose of constructing and operating a tunnel railroad or railroads from an adjoining state under the North or Hudson or Harlem river to a terminus within such city; or under the North or Hudson river and thence transversely across and under the surface of the borough of Manhattan and thence under the East river by the shortest practicable route; such railroad or railroads to be connected with some trunk line steam railroad or railroads whose terminus or termini are in an adjoining state, thereby forming a continuous line for the carriage of passengers and property between a point or points within such adjoining state and a point or points within the said city, provided such purpose is declared in the certificate of incorporation of such corporation. A similar grant may be made, or a similar contract or contracts entered into, upon the application of a railroad corporation, owning or actually operating a trunk line railroad whose terminus or termini are within such city, or of a railroad corporation owning or actually operating or by the certificate of the board of rapid transit railroad commissioners hereinafter in this section mentioned required to own or actually operate a railroad wholly or partly within said city and engaged or intended, and in said certificate so recited and required, to be in interstate commerce in connection with a trunk line railroad and which shall have or be required by such certificate to have a terminus or termini in said city, for the purpose of constructing and operating a railroad or railroads from such terminus or termini by the shortest practicable route to and under or over the East river or the North or Hudson river, or the Harlem river, to any point in an adjoining state, or to connect with any other similar railroad in this state. If and when in the judgment of said

board the public interests so demand, the said board may, with like approval, by the concurrent vote of six of its members fix and determine the route or routes by which any such railroad corporation making such application may so establish and construct or so extend its lines into or within said city, and may authorize any such railroad corporation to construct and operate any such railroad or connecting railroad under any lands, streets, avenues, waters, rivers, parkways, highways or public places in the said city, and also in the case of any such railroad or connecting railroad which is, or by the terms of the said certificate of the said board of rapid transit railroad commissioners is required to be, operated or used as a part of an interstate trunk line, to construct and operate the same over and across any such lands, waters, rivers, streets, avenues, parkways, highways or public places in the said city, * * *."

and was again amended by Chapter 606 of the Laws of 1906 in minor details, and also by Section 6 of Chapter 498 of the Laws of 1909 by substituting the "Public Service Commission" for the "Board of Rapid Transit Commissioners," and a few other like changes of phraseology.

By Chapter 429 of the Laws of 1907, the Public Service Commissioners were created, and by Subdivision 6 of Section 5, it was provided that the commissioners in the first district shall have and exercise all powers heretofore conferred upon the Board of Rapid Transit Commissioners under Chapter 4 of the Laws of 1891 and the acts amendatory thereto; and by Section 83 it was provided that the Board of Rapid Transit Commissioners shall be abolished and that all the powers and duties of such board conferred and imposed by any statute of this State shall thereupon be exercised and performed by the Public Service Commission of the first district (including the counties of New York, Kings, Queens and Richmond).

By virtue of Section 30 of Chapter 203 of the Laws of 1878, Chapter 566 of the Laws of 1890 and the present Transportation Corporations Law, Chapter 218, Laws of 1909, Section 48, "the Commissioners of the Land Office shall have power to grant to any pipe line corporation any lands belonging to the people of this State which may be required for the purposes of its incorporation on such terms as may be agreed on by them, or such corporation may acquire title thereto by condemnation, and if any lands owned by any county, city or town be required by such corporation

for such purposes, the county, city or town officers having charge of such lands may grant them to such corporation upon such terms and for such compensation as may be agreed upon."

Under an act, Chapter 338, Laws of 1892, authorizing the East River Gas Company of Long Island City "to lay, and maintain * * * conductors, mains and pipes under and across the East river and across the intervening land belonging to the City of New York, or to private persons, at such places as it may determine," and also "to acquire by condemnation all such additional property, public or private, or right, interest or easement therein, for the laying and maintaining of its mains, pipes and conductors as may be necessary in the exercise of the powers hereby conferred," the said East River Gas Company acquired by condemnation an easement to construct a tunnel from the foot of One Hundred and Tenth street, Manhattan, to Astoria on Long Island (see 119 App. Div. 350, aff., 190 N. Y. 528).

RENEWALS OF WATER GRANTS.

Under a provision of the Public Lands Law, Section 14 of Chapter 50 of the Laws of 1909, taken from Chapter 313 of the Laws of 1904 and originally revised from Revised Statutes, Part 1, Chapter 9, Title 5, Sections 58 and 60, which reads as follows:

"The commissioners of the land office may, unless otherwise provided, fix a reasonable time, not less than one year, for the performance of conditions. A notice of the time so fixed shall be published in the state paper at least once a week for six successive weeks, and a copy of such notice shall be mailed to the persons interested, whose post-office addresses are known. If such conditions are not performed within the time limited by such notice, the persons entitled to any benefit under such grant shall forfeit all right to and title in the premises. When the time within which any condition contained in any grant of land is fixed by the terms of the grant, the commissioners of the land office may, for good cause shown before the expiration of such time, extend the time within which such condition is to be performed, not exceeding three years."

It has been the practice of the Land Board to accept the surrender of former grants and issue new grants usually for a period of three years, in the identical forms under which the original letters-patent were issued, and in some instances, just previous to the expiration of the period for which such renewal grants were issued,

the Board has granted second extensions. In this connection the opinion of Attorney-General Carmody to the Land Board under date of March 27, 1911, in the Matter of the Application of the New York Dock Company, is pertinent:

"GENTLEMEN — On April 1st, 1902, grants were made to the New York Dock Company of lands under water adjacent to their uplands lying on the easterly shore of the East River, in the Borough of Brooklyn, extending from Fulton Street to Hamilton Ferry out to the pierhead line of 1900. One of the five grants so made was for seventeen and six hundred fifty-five one-thousandths acres at an appraisal of \$42,732 for restricted beneficial enjoyment. (See Land Board Minutes for 1902, pages 63-64.) This grant was made upon the usual conditions and that improvements referred to therein should be made within five years.

On April 25th, 1907, the New York Dock Company having applied for an extension of time within which to comply with the conditions contained in four of the said letters-patent, including the one above particularly described, it was ordered that upon surrender or cancellation of the patents issued to said company April 1st, 1902, above referred to, and upon payment of \$50 on account of grant in each case and \$5 patent fee for each parcel, that new letters-patent issue to said company in the same form as those surrendered and the time within which to comply with conditions to be limited to three years in each case. Subsequently and at a meeting of the Land Board, held November 14th, 1907, the Commissioner of Docks and Ferries of The City of New York filed with the Commissioners of the Land Office his certificate under Section 86 of the Charter of The City of New York to the effect that the granting of the same would conflict with the rights of The City of New York under the Greater New York Charter, as amended, and be otherwise injurious to the public health of the city unless the following terms and conditions be inserted in said grant:

"The grantee shall in case the grant is made, for the purpose of commerce, furnish access to the dock or docks erected on the lands under water granted, by means of a public highway, and therefore, the Commissioner of Docks of the City of New York respectfully recommends that such terms and conditions, if so recommended, be inserted in said grant."

The Land Board having non-concurred in the recommendation of the Commissioner of Docks and Ferries, and the applicant having surrendered for cancellation his original patents of 1902, and having paid into the treasury of the State, \$50 on account of the grant in each case and also \$5 patent fee for each parcel, it was thereupon ordered that new letters-patent issue to said company in the same form as those surrendered; the time within which to comply with the conditions to be limited to three years in each case. (See Land Board Minutes for 1907, pages 163 to 166 and 173.) Letters-patent were accordingly issued on November 14th, 1907, providing that unless the improvements specified are completed within three years from the date of these patents, this grant shall cease and determine and become null and void.

On November 14th, 1910, the New York Dock Company filed its application to this Board for a further extension of time to construct the improvements referred to in the original letters-patent, and on March 24th, 1911, the applicant filed an amended application for extension of time to comply with conditions of grant of November 14th, 1907, omitting all references to the 1902 grant.

By section 75 of the Public Lands Law, the Land Board is authorized to grant lands under water to riparian owners in perpetuity 'or otherwise.' Section 14 of the Public Lands Law, being chapter 46 of the Consolidated Laws, provides that the Commissioners of the Land Office may, unless otherwise provided, fix a reasonable time, not less than one year, for the performance of the conditions and further provides 'when the time within which any condition contained in any grant of land is fixed by the terms of the grant, the Commissioners of the Land Office may, for good cause shown before the expiration of such time, extend the time within which such condition is to be performed, but not exceeding three years.'

Section 76 of the Public Lands Law provides that 'every applicant for a grant of land under water shall previous to his application cause notice thereof to be published at least once a week for six weeks successively, in a newspaper printed in the county in which the land so intended to be applied for is situated, and a copy of such notice to be posted for the same period upon the door of the court house of such county, and if there be no court house in such county, at such place as the commissioners direct.'

Section 14 above referred to (except that portion quoted) was taken from first revised statutes, sections 58, 59 and 60, title 5, chapter 9, part 1, having reference only to unappropriated State lands and not at all to lands under water.

The sentence quoted, authorizing extensions of time within which to comply with conditions, was new matter first inserted in the revision of the law by chapter 317, Laws of 1894, the Public Lands Law. For many years past and as early as 1885, resolutions were passed by the Land Board, without express legislative authority, extending the time of patentees of water grants to comply with conditions, but apparently it was not until after the Act of 1894 that new letters-patent therefor were actually issued, the older method being to furnish the patentee merely with a certified copy of the resolution of extension. It is very doubtful whether section 14 or any part of the section was intended to have any application whatever to *lands under water* and even if it was so intended, it is questionable whether letters-patent for an extended period, can lawfully be granted without publication and posting of the statutory notice required by section 76.

Assuming, however, that the Land Board has the power under section 14 to extend the time to comply with conditions in water grants, only one such extension for period not exceeding three years is contemplated by the statute. The patent of 1907 to the New York Dock Company was made without advertisement of notice under section 76 and, therefore, must be construed to be merely an extension and not an original grant.

I am, therefore, of the opinion that your Honorable Board has no

power to grant the second extension now asked for, except after a new application, as provided by sections 75 and 76 of the Public Lands Law. Should such new application be made, I am further of the opinion, that the Land Board may properly waive its customary rules, except those in relation to publication and posting of the statutory notice of the application required by section 76, and also of proof of service of a copy of such notice upon the local authorities, referring to the original application papers for other facts. Your Honorable Board may take into consideration, in fixing the price to be paid by the applicant for a new grant, the amount of money he has already paid for patents of said premises.

Respectfully submitted,

THOMAS CARMODY,
Attorney-General."

At a meeting of the Land Board held April 27, 1911, the Attorney-General presented the following rules and regulations governing applications for extensions of time within which to comply with conditions contained in letters-patent, which, on motion, were adopted:

" COMMISSIONERS OF THE LAND OFFICE, ALBANY, N. Y.:

Resolutions governing extensions of time within which to comply with the conditions contained in *Letters-Patent*.

Resolved, That every applicant for an extension of a grant of land under water shall comply with the following regulations:

1. Every such applicant, previous to the filing of his application, shall, unless otherwise ordered by the Commissioners of the Land Office, give notice thereof, by advertisement, to be published at least once each week for six consecutive weeks in a newspaper printed in the county in which the land so intended to be applied for is situated and by causing a copy of such notice to be posted for the same period upon the door of the court house of such county, and if there be no court house in the county, at some prominent place which may be designated by the board of supervisors of said county, for posting legal notices in accordance with the provisions of section 76 of the Public Lands Law.

2. Such notice shall state that any person deeming himself liable to injury by reason of such grant may file with the Commissioners of the Land Office a remonstrance, stating why said grant will be an injury to him or his property, and that said remonstrance should be filed on or before the date of filing of the said application and said notice shall be substantially in the following form:

FORM OF NOTICE FOR PUBLICATION.

* * * * *

3. Affidavits of the due publication and posting of said notice shall be filed with said Commissioners.

4. In all cases where the lands under water applied for are situated in the city of New York, a copy of such notice shall be served, at least

thirty days before filing said application upon the corporation counsel and commissioner of docks of said city, and in all other cases, if in a city, on the mayor thereof, if in an incorporated village on the president thereof, or if in neither a city or incorporated village, then, on the supervisor or town clerk of the town, and affidavits of such service shall also be filed with said Commissioners.

5. The applicant shall also present a verified petition, stating:

a. The date of the original water grant and name of grantee.

b. The work actually done as contemplated in the grant, and reasons why the work has not been done or completed.

c. That the applicant is still the owner of all of the uplands described in the original application, or if he has disposed of any of said uplands, full particulars of such sale and a full description of his present uplands and lands under water adjoining the same by metes and bounds, and a map showing the uplands owned by him, together with the adjoining lands under water, and also showing the character of improvements made under the grant, if any have been made.

d. That the petitioner intends in good faith to appropriate the lands for the purposes set forth in the original grant, and the character of improvements he intends to make and within what time he intends to make the same.

The said petition being approved by the Attorney-General and the State Engineer, and being granted by the Board, letters-patent shall issue to the petitioner in the same manner as in original applications (except that the time within which to comply with the conditions therein contained shall be limited to three years), upon payment of a sum to be determined in each instance by the Board, together with the usual patent fee of \$5 for *each parcel*.

The above provisions shall apply to the original grantee, his heirs, executors, administrators or assigns, but satisfactory proof of the interest of the latter must be submitted.

If application is made for an extension of time covering the same lands as the original patent, said patent must be attached to the petition.

6. If the petitioner is not the original grantee he must prove title to the satisfaction of the Board and proof of title must be attached to and made part of the petition."

LEASE FOR SHELL FISH CULTIVATION.

Chapter 385 of the Laws of 1884 ceded lands under water of Gardiner's and Peconic bays to Suffolk county, for the cultivation of shell fish.

Chapter 584 of the Laws of 1887 provided for the granting of perpetual franchises by the Commissioners of Fisheries for the purpose of shell fish cultivation on the lands under the waters of this State, mentioned in Section 1 of this Act, suitable for planting and cultivation of shell fish, but the provisions of this act are

declared not to be deemed to limit or interfere with the powers of the Commissioners of the Land Office to grant to owners of uplands adjacent to such fisheries any of the lands under the waters of this State, as is now provided by law, but any grant by the land board of lands used for shell fish cultivation shall be subject to the right of the occupant to use said lands for such cultivation and removal of shell fish within two years thereafter.

See also Section 6 of the Game Law, Chapter 488, Laws of 1892 and amendment by Section 2, Chapter 573, Laws of 1893.

See also Fisheries, Game and Forest Law, Chapter 395, Laws of 1895, Sections 7, 197 and 198, and amendments by Chapter 653, Laws of 1896, and Chapter 657, Laws of 1896.

See also Forest, Fish and Game Law, Chapter 20, Laws of 1900, Sections 158, 159 and 160, and amendment by Chapter 100, Laws of 1901, and Forest, Fish and Game Law, Chapter 24, Laws of 1909, Sections 195, 196, 197 and 198, authorizing the Superintendent of Marine Fisheries, under the direction of the Forest, Fish and Game Commission to lease lands under water for such shell fish cultivation, subject, however, as before to the power of the Commissioners of the Land Office to grant such lands.

See also Conservation Law, Chapter 647, Laws of 1911, Sections 150, 151, 154, 155 and 156.

Many special laws have been passed, too numerous to mention in this schedule, empowering the Land Board to make grants of lands under water.

(Compiled by E. H. LEGGETT.)

APPENDIX XIV.

RULES AND REGULATIONS

OF THE

Commissioners of the Land Office, Governing Applications for
Grants of Lands Under Water

Adopted by resolution, December 1, 1920.

1. Anyone intending to apply for a grant of lands under water should give notice of such intention to the State Engineer and Surveyor, using blank "Form A" hereunto annexed, stating fully and in detail contemplated improvements and estimated cost of same, and shall therein limit the lands to be surveyed and applied for to such an area as is absolutely necessary for the purpose of making the contemplated improvements.

A certified check for One Hundred Fifty Dollars (\$150.00) made payable to the State Engineer and Surveyor must accompany the notice of intention to insure payment of the actual cost of making survey, maps and descriptions. Any additional cost must be paid by said applicant before delivery of the maps. (Only the actual cost of the survey, maps and descriptions will be charged. A refund will be made if the cost is less than the amount advanced.)

Certified copies of title deeds must be filed as specified in said form of notice.

2. The notice must state whether a grant for the purposes of commerce or beneficial enjoyment is to be applied for. In every case when an application for a grant is filed with the commissioners, the State Engineer shall transmit said notice with copies of all title deeds submitted to him, to the Commissioners of the Land Office.

3. The State Engineer and Surveyor shall prepare two maps upon tracing cloth which shall be marked, respectively, "A" and "B," and which shall show the lands under water applied for and

also the adjacent lands owned by the applicant. The scale of map "A" shall be fifty feet to an inch and the scale of map "B" four hundred feet to an inch. Said maps shall be of a standard size, twenty-four by thirty-six inches. The working space on the tracings shall be twenty-two by thirty-three inches, except that sufficient space shall be reserved in the lower right-hand corner for the title, description of lands applied for and signature of approval.

Map "A" must also show the adjoining lands on each side, and all adjacent docks, bulkheads or other improvements; also the boundaries of all previous water grants within the limits of the map, and the courses and distances of the boundaries of the lands applied for, and the depth of the soundings once in fifty feet on the whole exterior water lines.

Map "B" must show the general course of the shore a distance of one mile in each direction from the lands applied for, as well as the particular course at the point where the lands are applied for, and if the water be a river or a narrow body of water, the width of such water or river together with an outline of each shore, to extend one mile upon both sides thereof above and below the lands applied for, providing the body of water is less than two miles wide.

4. "Notice of application" must be as in "Form B" hereunto annexed. All affidavits must be made upon the blanks hereunto annexed. The requirements as herein provided must be strictly observed.

5. The following affidavits, maps and papers are to be filed with the Commissioners:

(a) An affidavit showing publication of the notice of application at least once a week for six weeks, successively, in a newspaper printed in the county or counties in which the lands applied for are situated, the first publication of such notice to be at least forty-two days before the date of application. See "Form C."

(Attention is called to the fact that certain lands under the waters of the East River, below low water mark, adjoining the counties of Kings and Queens, are within the county of New York. See section 2 of the Montgomery Charter of 1730 and section 1, chapter 410, Laws of 1882, being the Consolidated Laws of The State of New York, which provides that the county of New York

shall extend to and along low water mark of Long Island Sound from College Point across Flushing Bay to Sanford's Point and thence along the Long Island shore at low water mark to the south side of Red Hook.)

(b) An affidavit showing that a printed copy of said notice of application was posted upon the door of the courthouse of the county or counties in which the lands applied for are situated, at least forty-two days before the date of application. See "Form D."

(c) An affidavit showing that a printed copy of said notice of application was served at least thirty days before the date of application, upon the owners whose names shall be ascertained as prescribed in "Form E," of the lands on the waterfront adjoining on each side the lands of the applicant adjacent to the lands applied for and described in said notice of application. Said notice shall be served on such owner personally, if service can be made within this State. If the applicant shall not be able to cause said notice to be served personally within this State after making diligent efforts so to do, he may cause the same to be served upon the occupants of said adjoining lands, or if there be no occupant thereon, by posting printed copies of said notice in three public places in the town or ward wherein said adjoining lands are situated. See "Form E."

(d) An affidavit of the applicant that he intends forthwith to appropriate the lands applied for to the purposes of commerce and to use such lands to promote the commerce of this State by erecting and maintaining thereon a public dock or docks, or that said lands are necessary and proper for the purposes of his beneficial enjoyment of the same, and that he intends in good faith to fill in said lands and/or to erect and maintain upon said lands certain permanent structures, docks or buildings, said contemplated improvements to be fully described and in detail. See "Form Fa" and "Form Fb."

The said affidavit of the applicant shall also state the assessed value of the lands owned by applicant adjacent to the lands applied for, on the next preceding assessment roll of the city or town in which said adjacent lands are situated, and shall also state the area of said adjacent lands.

(e) When the lands applied for are situated within the corporate limits of any city or incorporated village, an affidavit of the personal service of a copy of the printed notice upon the mayor or clerk of the common council of the city or upon the president or clerk of the village, or if the lands applied for are not within the limits of any city or incorporated village, an affidavit or personal service of a copy of the printed notice upon the supervisor or town clerk of the town in which said lands are situated. (Such service is to be made at least thirty days previous to the making of such application.) See "Form G."

(f) A search or an abstract of title of the adjacent lands of the applicant covering a period of at least thirty years prior to the time of application, or in case of no record title, proof by affidavit or affidavits of adverse possession of twenty years or more next preceding the time of application, with claim of ownership by the applicant himself and by those under whom he claims. The affidavits of possession must state the facts of ownership and use, which are alleged to constitute claim of title by adverse possession. See "Form H."

(g) Maps "A" and "B" herein described.

(h) In all applications for grants of land under water in The City of New York, an affidavit of service of said notice of application and maps upon the Corporation Counsel of The City of New York, see "Form I," and also an affidavit of service of said notice of application and maps upon the Department of Docks of The City of New York, see "Form J."

(i) In applications made by The City of New York pursuant to the provisions of section 86 of chapter 466, Laws of 1901 (Charter of The City of New York), the city shall file with the Commissioners satisfactory proof of who are riparian proprietors and of service of notice of such applications upon such riparian proprietors, giving the names and addresses of the persons so served.

6. Blanks must be fastened together in their alphabetical order, as per letters in lower right-hand corner and the set properly endorsed.

7. All searches, abstracts of title, title papers and affidavits of adverse possession filed with the Commissioners, shall be referred

to the Attorney-General for examination of title. The Attorney-General shall cause an examination of the title of the adjacent lands of the applicant to be made and shall report to said Commissioners whether in his opinion the applicant is the owner of such adjacent lands.

8. All applications for grants of lands under water shall be referred for appraisal to one or more of the official appraisers of the Commissioners, and letters-patent shall issue only on payment of the value so reported, or such sums as the Commissioners shall, under all circumstances, deem reasonable. Such payment shall be made within three months from the date of the resolution granting the application.

9. The minimum sum to be charged the patentee in each case of a grant of lands under water, is fixed at fifty dollars (\$50).

For every patent five dollars for each parcel included therein, shall be charged.

10. There shall be a special committee of the Commissioners for the purpose of hearing contested applications for grants of lands under water. This committee shall be known as "The Standing Committee on the Hearing of Remonstrances" and shall consist of the Attorney-General, State Treasurer and State Engineer and Surveyor, which shall adopt rules of practice.

The Secretary of the Commissioners shall furnish to all persons who have filed remonstrances as provided for by the notice of application, copies of the Rules of Practice of such Standing Committee as to the hearing of said remonstrances. The Secretary shall also give notice to the applicant of all remonstrances filed and shall furnish said applicant with a copy of said Rules of Practice.

11. The Secretary of the Commissioners shall give notice to the applicant and to all persons who may apply to him therefor, as to when and where the Commissioners will meet to consider said application.

12. All letters-patent shall conform to the blank forms hereunto annexed. See "Form K" and "Form L."

13. The rules relating to extensions of time within which to comply with the conditions contained in letters-patent and blank forms

of application for such extensions shall be furnished by the Secretary of the Commissioners upon application.

(See last sentence of section 14, Public Lands Law.)

14. All communications should be addressed to the "Commissioners of the Land Office, Office of the Secretary of State, Albany, N. Y."

NOTE. Consult Secretary of State for any amendments or changes.

STATE ENGINEER AND SURVEYOR,
ALBANY, N. Y.

SIR:

You are hereby notified that it is the intention of the undersigned to apply to the Commissioners of the Land Office for a grant of certain lands under water located in the..... of..... County of..... for the purposes

of * $\left\{ \begin{array}{l} \text{commerce} \\ \text{beneficial enjoyment.} \end{array} \right.$

The undersigned intends to make the following improvements upon said lands:.....

The estimated cost of making the improvements are \$..... as follows:

The said lands under water to be applied for extend along the adjacent lands of the undersigned a distance of.....feet, and are to extend from said adjacent lands a distance of..... feet into the water of.....

to the $\left\{ \begin{array}{l} * \text{ bulkhead} \\ \text{pierhead} \\ \text{harbor} \end{array} \right\}$ line, subject to the recommendation of the State Engineer.

The undersigned herewith makes deposit of a certified check for One Hundred Fifty Dollars (\$150.00) payable to the order of the State Engineer and Surveyor to insure payment for survey, maps and descriptions and guarantees to reimburse said State Engineer and Surveyor on demand if the cost of the survey, maps and descriptions should exceed the amount of such certified check.

There are enclosed certified copies of the deeds of said adja-

cent lands of the undersigned as well as certified copies of the deeds of the lands adjoining same.

DATED,....., 19...

.....
(Applicant)

(Post-Office Address)

.....
(Attorney for Applicant)

(Post-Office Address)

* Strike out words not applying.

NOTE. If applicant has a map or sketch showing location of lands applied for, same should be furnished.

FORM A

FORM OF "NOTICE OF APPLICATION"

Notice of Application to the Commissioners of the Land Office
for a Grant of Land Under Water.

TAKE NOTICE, That the undersigned will on the day of 19..., (this date must be forty-two days after date of first publication but need not be a day on which the Commissioners meet) make an application to the Commissioners of the Land Office for a grant of the lands under water hereinafter described. Any person deeming himself liable to injury by said grant, should before said date file with said Commissioners, at the office of the Secretary of State in the Capitol in Albany, a remonstrance, stating his reasons for opposing said grant.

The lands under water above mentioned are bounded and described as follows, to wit: (here must follow a concise description of the land, the exact courses and distances to be given in words of full length as furnished by the State Engineer), containing acre.. and of an acre.

The lands of the undersigned applicant, adjacent to the lands applied for, are bounded (here insert boundaries of lands, adjoining such adjacent lands, giving names of the owners thereof), and said adjacent lands of the occupant are actually occupied by (here insert names of persons actually living upon the property, whether applicant or applicant's tenants or servants).

(a) It is the intention of the undersigned forthwith to appropriate said lands under water to the purposes of commerce, by the erection thereon of a public dock or docks.

(b) It is the intention of the undersigned to appropriate said lands under water to his beneficial enjoyment by filling in the same and (or) erecting thereon the following permanent structures, docks or buildings, viz:.....

.....

 (Use paragraph a or b, according to the form of letters-patent desired.)

DATED,....., 19...

.....
 (*Applicant*)

(*Post-Office Address*)

.....

 (*Attorney for Applicant*)

(*Office and Post-Office Address*)

.....

FORM B

AFFIDAVIT OF PUBLICATION.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
of the
in the County of.....
being duly sworn, says:

1. That he is the.....
of
newspaper printed and published
in the in
the County of
in the State of New York.

2. That notice, of which the
annexed is a printed copy, has been
published in said newspaper once a
week for six weeks, successively,
commencing on the.....day of
..... 19... and continuing
on the following dates:

.....day of..... 19...
.....day of..... 19...
.....day of..... 19...
.....day of..... 19...
.....day of..... 19...
.....day of..... 19...

Sworn to before me this..... }
day of..... 19... }
.....
.....

NOTE. The first publication of said notice must be at least forty-two days
before the date of application.

FORM C

AFFIDAVIT OF POSTING NOTICES ON COURTHOUSE.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
of
in the County of.....
being duly sworn, says:
1. That on the.....day of
.....19.., he securely posted
upon the outer door of the court-
house of the County of.....
in the State of New York, in the
.....
in said county, a notice, of which
the annexed is a printed copy.

Sworn to before me this..... }
day of..... 19... }
.....
.....

NOTE. The posting of said notice must be at least forty-two days before
the date of application.

FORM D

AFFIDAVIT OF SERVICE ON AN OWNER OF ADJOIN-
ING LANDS.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
of
in the County of.....
being duly sworn, says:
1. That on the.....day of
..... 19.., at.....
he personally served upon.....
.....

a printed copy of the annexed notice, by delivering to and leaving the same with.....

.....

(Use either one of the following forms which may be applicable; strike out the others.)

(a) That the said was personally known to deponent to be an owner of lands on the water front adjoining the lands of the applicant adjacent to the lands applied for and described in the annexed notice.

(b) (or) That the said was known to deponent to be shown on the records of the office of the clerk or register of the County of to be an owner of lands on the water front and who deponent verily believes is the present owner of said lands, adjoining lands of the applicant adjacent to the lands applied for and described in the annexed notice.

(c) (or) That the said was known to deponent to be shown on the last preceding assessment roll of the town or ward wherein said lands are situated to be an owner of lands on the water front and who deponent verily believes is the present owner of said lands, adjoining the lands of the applicant adjacent to the lands applied for and described in the annexed notice.

(d) (or) That the said was known to deponent to be the occupant of lands on the water front adjoining the lands of the applicant adjacent to the lands applied for and described in the annexed notice. Deponent further says that he was unable to serve said notice personally upon the owner of said lands adjoining those of applicant within this State after making diligent effort so to do for the following reasons:

2. (or) That on the day of, 19.. at he securely posted printed copies of the annexed notice in the following three public places, viz.: at in the town or ward wherein the lands on the water front adjoining the lands of applicant adjacent to the lands applied for and described in said notice, are situated. Deponent further says that

said lands adjoining those of applicant are unoccupied and that he was unable to serve said notice personally upon the owner of said lands, within this State, after making diligent efforts so to do, for the following reasons:

Sworn to before me this..... }
 day of..... 19... }

 FORM E

AFFIDAVIT OF APPLICANT.

STATE OF NEW YORK. }
 COUNTY OF..... } ss.:

.....
 of the
 in the County of
 being duly sworn, says:

1. That ..he
 the person named in the annexed
 printed notice, as the applicant for
 a grant of lands under water,
 therein particularly described.

2. That ..he.. has read the
 same and knows it to be true.

3. That the said lands are situ-
 ate in the
 in the County of
 in the State of New York, and
 are
 within the corporate limits of a
 city or incorporated village, viz.:

4. That ..he...
 owner in fee of the adjacent lands
 described in said annexed notice,

and that said lands are now actually occupied by

5. That the lands owned by applicant adjacent to the lands hereby applied for were assessed at the sum of dollars, on the next preceding assessment-roll of the in which said adjacent lands are situated, and said lands are of the area of

6. That intend
.....
forthwith to appropriate the land applied for to the purposes of commerce by erecting thereon a public dock, or docks, and that the lands applied for are not more than are necessary for that purpose.

Sworn to before me this..... }
day of..... 19... }
.....
.....

NOTE. This form to be used only in applications for purposes of commerce.

FORM Fa

AFFIDAVIT OF APPLICANT.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
of the
in the County of
being duly sworn, says:

1. That ..he..
the person named in the annexed

printed notice, as the applicant for a grant of the lands under water, therein particularly described.

2. That ..he.. has read the same and knows it to be true.

3. That the said lands are situate in the
.....
in the County of
in the State of New York, and are
within the corporate limits of a city or incorporated village, viz.:

4. That ..he..
owner in fee of the adjacent lands described in said annexed printed notice, and that said lands are now actually occupied by

5. That the lands owned by applicant adjacent to the lands hereby applied for were assessed at the sum of dollars, on the next preceding assessment-roll of the
in which said adjacent lands are situated, and said lands are of the area of

* 6. That applicant... intends in good faith to erect upon said lands applied for, the following permanent structures, docks or buildings which are necessary for the beneficial enjoyment of the same for the reasons hereinafter stated. That it is the intention of applicant to improve all and every part of the lands applied for and at all times to keep said improve-

ments in proper maintenance and
repair, as follows:

* 7. That applicant intends to fill in the same, which filling
in for the beneficial enjoyment of the same is necessary for the
following reasons:

Sworn to before me this..... }
day of..... 19... }

* Use whichever paragraph is applicable or both if both are applicable.
This form to be used only in applications for beneficial enjoyment.

FORM Fb

AFFIDAVIT OF SERVICE ON MAYOR, PRESIDENT, SUPERVISOR OR CLERK.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
.....
of
in the County of
being duly sworn, says that on
the day of
....., 19..., he
personally served upon
.....
who was to him personally known
to be the
.....
of the
of
in the County of
in the State of New York, a no-

tice of which the annexed is a
printed copy, by delivering to and
leaving the same with him.

Sworn to before me this.....}

day of..... 19...}

.....

.....

.....

FORM G

AFFIDAVIT OF TWENTY YEARS ADVERSE POSSESSION.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....

.....

of

in the County of

in the State of New York, being
duly sworn, says:

1. That he is well acquainted
with the lands described in the
annexed printed notice, and has
been so for more than twenty years
last past.

2. That the lands adjacent
thereto have been for more than
twenty years last past in the open,
notorious and adverse possession
of

.....

and those under and through whom

.....

now holds and claims, and that
such possession during the time
aforesaid was accompanied by a

claim of title and ownership by
and on the part of the said

.....
.....

and those under and through whom
now claims title to said premises, and such possession and claim
of title were accompanied by the following acts of ownership and
use, aside from mere payment of taxes thereon, viz.: (names of
each owner for past 20 years and periods of respective ownership
should be shown and reference made to deeds and wills.)

.....
.....

That said possession has been peaceable and undisturbed and
that the title to the said lands has not been disputed or questioned
and no adverse claim of title has been made thereto for
years, to the personal knowledge of deponent.

Sworn to before me this..... }
day of..... 19... }
..... FORM H
.....

AFFIDAVIT OF SERVICE ON THE CORPORATION COUNSEL OF THE CITY OF NEW YORK.

STATE OF NEW YORK. }
COUNTY OF..... } ss.:

.....
of
in the County of
being duly sworn, says that on
the day of,
19..., he personally served upon
.....
who was to him personally known
to be the

.....
 of the Corporation Counsel of The
 City of New York, a notice of
 which the annexed is a printed
 copy, by delivering to and leaving
 the same with him, together with
 blue print copies of Maps "A"
 and "B" to be filed with said
 application.

Sworn to before me this..... }
 day of..... 19... }

This affidavit only required in applications for grants of land under water
 in The City of New York, and notice must be served at least forty-two days
 before date of application.

FORM I

AFFIDAVIT OF SERVICE ON THE DEPARTMENT OF DOCKS.

STATE OF NEW YORK. }
 COUNTY OF..... } ss.:

.....

 of
 in the County of
 being duly sworn, says that on
 the day of
 19..., he personally served upon

 who was to him personally known
 to be the
 of the Department of Docks of
 The City of New York, a notice
 of which the annexed is a printed
 copy, by delivering to and leaving
 the same with him, together with
 blue print copies of Maps "A"

and "B" to be filed with said application.

Sworn to before me this..... }
 day of..... 19... }

This affidavit only required in applications for grants of land under water in The City of New York, and notice must be served at least forty-two days before date of application.

FORM J

FORM OF PATENT TO PROMOTE THE COMMERCE OF THIS STATE.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF
GOD, FREE AND INDEPENDENT.

To All To Whom These Presents Shall Come, Greeting:

Know ye, that pursuant to a resolution of the Commissioners of our Land Office, dated the day of, 19..., and in consideration of the sum of dollars (\$.....), lawful money of the United States, paid by of

(Insert name of street and number)

in the of, County of and State of, and upon the conditions hereinafter expressed, we have given and granted and by these presents do give and grant unto the said the owner of the lands adjacent to the lands hereinafter described, his grantees, heirs, devisees or successors in interest (hereinafter referred to as the "patentee"), the following described lands under water, to wit:

(Here insert description)

reserving, however, to the said people the right to use said lands for dockage and wharfage purposes on the conditions hereinafter stated.

These letters-patent are issued, however, and this grant is made and accepted:

FIRST.— To enable the said “patentee” to promote and improve the commerce of this State and to that end to erect and maintain on said lands a public dock, wharf, piers and slips, and to collect from those using same, statutory rates of dockage or wharfage if same have been prescribed, and if not, reasonable and accustomed dockage or wharfage, but not to enable the said “patentee” to erect and maintain a building or buildings for private manufacturing purposes or for purposes of private or beneficial enjoyment or for purposes not strictly for the improvement and promotion of public commerce and in aid of navigation.

SECOND.— Upon the express condition that if at the end of five years from the date of these presents or at any time thereafter, any part of said lands hereby granted are not improved as follows:

(a) By building and maintaining thereon a bulkhead or retaining structure and filling in back of same; or

(b) By erecting and maintaining on said lands upon piles or other supports a building or buildings for temporary storage purposes, or a pier or piers, of a substantial character; together with the necessary slip or slips;

(which shall be known as “improvements”), then these letters-patent and this grant shall become null and void as to the part not so improved; and no right, title or interest in and to the lands hereinabove described not so improved shall vest in the said “patentee” or accrue by virtue of these presents; and the People of the State of New York may thereupon re-enter into and become possessed of the lands hereinabove described or any part thereof which have not been or which are not then so improved, without any liability.

There is reserved to the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described lands which have not been improved as aforesaid, as the said people might have done had this grant not been made.

THIRD.— Upon the express condition that if the said “patentee” shall erect and maintain on said lands under water, buildings or structures other than those necessary for the temporary storage of goods, wares and merchandise in transit and in aid of navigation, or shall devote said premises to other than public dockage

purposes and the loading and unloading of merchandise and persons and the temporary storage of merchandise, then these letters-patent and this grant shall become null and void and no right, title or interest in and to the lands hereinabove described shall vest in the said "patentee" or accrue by virtue of these presents; and the People of the State of New York may thereupon re-enter into and become possessed of the lands hereinabove described, or any part thereof, without any liability.

FOURTH.—Upon the express condition that if the State of New York shall at any time hereafter acquire said premises and "improvements," or a part or portion thereof, by appropriation or otherwise, the liability of the State shall be limited to the amount paid by said "patentee" to the State for this patent, or a proportionate part thereof, together with the expenses necessarily incurred by the "patentee" for the acquiring of this patent, which are hereby fixed at the sum of \$350, and, also, the value of the "improvements" on said premises, or the proportionate part thereof which may be so acquired. The value of such "improvements" if all are so acquired, or such proportionate part of the amount paid by said "patentee" for this patent and of the value of such "improvements" on a portion of such lands which may be so acquired by the State, and all damages, if any, to the remainder of such "improvements" which may not be so acquired, to be paid by the State of New York, shall be determined as provided by the Legislature authorizing such acquisition.

(If lands granted are within The City of New York, add the following):

FIFTH.—This grant is made and accepted upon the express covenant, terms and conditions that The City of New York may at any time hereafter acquire the interest in the premises herein described, which the patentee may have acquired under or by virtue of this patent, upon paying to the patentee, his heirs, successors or assigns the amount paid by said patentee to the State for the said interest in said premises, together with the expenses necessarily incurred by the patentee for the acquiring of such patent, which are hereby fixed at the sum of \$350, and also the value of the improvements on said premises; or may acquire the interest acquired under this patent to a part or a portion of said premises.

upon paying to the patentee, his heirs, successors or assigns the proportionate share of the amount paid by such patentee to the State for such interest in part or portion and a proportionate part of the said expenses, together with the value of the improvements on the portion thereof acquired at the time The City of New York shall acquire title to such interest, and also all damages, if any there be, to the improvements upon such part of the premises herein described not acquired by The City of New York as shall be occasioned by the division of the herein described premises. And that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York.

(Here insert any other special restrictions, reservations or conditions.)

IN TESTIMONY WHEREOF, we have caused these our letters to be made patent, and the Great Seal of our said State to be hereunto affixed. Witness
 Secretary of State of our said State at our City of Albany, the day of, in the year of our Lord, one thousand nine hundred

Passed the Secretary's Office the day of, 19..

.....
Deputy Secretary of State.

FORM K

FORM OF PATENT FOR THE PURPOSE OF BENEFICIAL ENJOYMENT.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To All To Whom These Presents Shall Come, Greeting:

Know ye, that pursuant to a resolution of the Commissioners of our Land Office, dated the day of, 19..,

and in consideration of the sum of dollars (\$.....),
lawful money of the United States, paid by
of

(Insert name of street and number)

in the of, County of
and State of, and upon the conditions hereinafter
expressed, we have given and granted and by these presents do
give and grant unto the said
the owner of the lands adjacent to the lands hereinafter described,
his grantees, heirs, devisees or successors in interest (hereinafter
referred to as the "patentee"), the following described lands
under water, to wit:

(Here insert description)

These letters-patent are issued, however, and this grant is made
and accepted:

FIRST.—Upon the express condition that if at the end of five
years from the date of these presents or at any time thereafter,
any part of said lands hereby granted are not improved as follows:

(a) By filling in the lands under water hereinabove de-
scribed; or

(b) By building and maintaining thereon a bulkhead or
retaining structure and filling in back of same; or

(c) By erecting and maintaining on said lands upon piles
or other supports, a building or buildings, a structure or struc-
tures, or a pier or piers, of a substantial character; or by
maintaining a drydock on said lands; or by dredging and
maintaining on said lands, a slip or basin, or slips or basins,
for the proper approach to the landing of the "patentee"
adjacent to said slip or basin, or slips or basins;

(which shall be known as "improvements"), then these letters-
patent and this grant shall become null and void as to the part not
so improved; and no right, title or interest in and to the lands
hereinabove described not so improved shall vest in the said
"patentee" or accrue by virtue of these presents; and the People
of the State of New York may thereupon re-enter into and become
possessed of the lands hereinabove described, or any part thereof
which have not been or which are not then so improved, without
any liability.

There is reserved to the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described lands which have not been improved as aforesaid, as the said people might have done had this grant not been made.

SECOND.—Upon the express condition that if the State of New York shall at any time hereafter acquire said premises and “improvements,” or a part or portion thereof, by appropriation or otherwise, the liability of the State shall be limited to the amount paid by said “patentee” to the State for this patent, or a proportionate part thereof, together with the expenses necessarily incurred by the “patentee” for the acquiring of this patent, which are hereby fixed at the sum of \$350, and, also, the value of the “improvements” on said premises, or the proportionate part thereof which may be so acquired. The value of such “improvements” if all are so acquired, or such proportionate part of the amount paid by said “patentee” for this patent and of the value of such “improvements” on a portion of such lands which may be so acquired by the State, and all damages, if any, to the remainder of such “improvements” which may not be so acquired, to be paid by the State of New York, shall be determined as provided by the Legislature authorizing such acquisition.

(If lands granted are within The City of New York, add the following):

THIRD.—This grant is made and accepted upon the express covenant, terms and conditions that The City of New York may at any time hereafter acquire the interest in the premises herein described, which the patentee may have acquired under or by virtue of this patent, upon paying to the patentee, his heirs, successors or assigns the amount paid by said patentee to the State for the said interest in said premises, together with the expenses necessarily incurred by the patentee for the acquiring of such patent, which are hereby fixed at the sum of \$350, and also the value of the improvements on said premises; or may acquire the interest acquired under this patent to a part or portion of said premises upon paying to the patentee, his heirs, successors or assigns the proportionate share of the amount paid by such patentee to the State for such interest in part or portion and a proportionate

part of the said expenses, together with the value of the improvements on the portion thereof acquired at the time The City of New York shall acquire title to such interest, and also all damages, if any there be, to the improvements upon such part of the premises herein described not acquired by The City of New York as shall be occasioned by the division of the herein described premises. And that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York.

(Here insert any other special restrictions, reservations or conditions)

IN TESTIMONY WHEREOF, we have caused these our letters to be made patent, and the Great Seal of our said State to be hereunto affixed. Witness
 Secretary of State of our said State at our City of Albany, the day of, in the year of our Lord, one thousand nine hundred

.....

Passed the Secretary's Office the day of, 19..

.....

Deputy Secretary of State.

FORM L

APPENDIX XV-A.

THIS INDENTURE, Made this day of
in the year one thousand nine hundred and
BETWEEN

of the first part and

THE PEOPLE OF THE STATE OF NEW YORK, party of
the second part,

WITNESSETH:

WHEREAS, On the day of , there was
granted by the Commissioners of the Land Office of the State of
New York to

Letters Patent granting to for the purpose of

All that Tract or Parcel of Land situated in the of
in the County of and State of New York, described
as follows:

and which Letters Patent were duly recorded in the Office of the
Secretary of State in Book No. of Patents at page
and in the office of the Clerk of the County of
in Book No. of Deeds at page on the
day of , 19 ; and

WHEREAS, The said

part of the first part, the patentee named in said Letters
Patent still the owner of the premises therein
described, and of the rights and privileges thereby granted, and
of the uplands adjacent to the lands described in said Letters

Patent , or ha by sundry mesne conveyances succeeded to the title of said granted lands and the rights and privileges if any granted by said Letters Patent and to the ownership of the uplands adjacent to the lands under water therein described; and

WHEREAS, The said

applied to the Commissioners of the Land Office of the State of New York, for a new grant for restricted beneficial enjoyment embracing with other lands, all the lands under water which were included in the aforesaid Letters Patent;

Now THEREFORE, The said

hereby certif and declare that it is intention to surrender to THE PEOPLE OF THE STATE OF NEW YORK and do surrender consideration the lands under water described in said Letters Patent and all rights and privileges under said Letters Patent granted on the day of , 19 , which lands now or formerly under water are described as hereinbefore recited.

THIS SURRENDER is made subject to acceptance thereof by the said Commissioners of the Land Office, and when so accepted shall be without prejudice to said application by said

for a new grant, and the surrender shall take effect only upon the simultaneous order by the Commissioners of the Land Office ordering the issue of a NEW GRANT of the lands so applied for by said

upon such terms and conditions as said Commissioners shall declare and determine.

IN WITNESS WHEREOF, the part of the first part hereunto set hand and seal

this day of , 19 .

STATE OF NEW YORK, }
 County of } ss.

On this day of , in the year nineteen hundred and , before me, the subscriber, personally appeared
 to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

STATE OF NEW YORK, }
 County of } ss.

On the day , 19 , before me personally came to me known, who being by me duly sworn, did depose and say that he resided in the of in the County of and State of New York; that he is the of
 the Corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

APPENDIX XV-B.

THIS INDENTURE, made this day of
in the year One Thousand Nine Hundred and Twenty One,
BETWEEN Company, a corporation organized
under the laws of the State of New York, party of the First Part,
and The People of the State of New York, party of the Second
Part, Witnesseth:

WHEREAS, on the 16th day of May, 1902, and on the 1st day of
May, 1907, there were granted by the Commissioners of the
Land Office of the State of New York to Company,
its successors and assigns, letters-patent granting to it for the
purpose of promoting the commerce of said State, by the building
thereon of a public dock or docks, and for no other object or
purpose whatsoever, and with the reservations and upon the con-
ditions in said letters-patent stated, all that certain piece or parcel
of land under the waters of the East River in the Borough of
Manhattan, City of New York and County of New York (there-
after referred to and described in subsequent conveyances, as being
“in the Borough of Queens * * * and County of Queens,”
which description is erroneous, said lands being in fact, in the
County of New York) and lying in front of and contiguous to
certain lands under water granted to said Company
by letters-patent, dated April 10, 1895, and recorded in the Office
of the Secretary of State, in Book of Patents, number 49, page 5,
and which said lands under water so granted by said two letters-
patent first herein above referred to were therein described as
follows:

(Here insert description.)

WHEREAS, said letters-patent were duly recorded in the Office
of the Secretary of State in Book number 49 of Patents at pages
317 and 339, respectively, and

WHEREAS, the said Company, party of the
First Part, has by sundry mesne conveyances succeeded to the

title to said granted lands, and the rights and privileges, if any, granted by said two letters-patent:

Now, THEREFORE, the said Company, party of the First Part, hereby certifies and declares that it is its intention to surrender to the People of the State of New York, and in consideration of the sum of One Dollar, lawful money of the United States, to it paid by the said party of the Second Part, it does hereby surrender, grant and convey to the People of the State of New York, the lands under water described in said two letters-patent and all rights and privileges under said two letters-patent granted, respectively, on the 16th day of May, 1902 and the 1st day of May, 1907, which lands now or formerly under water are described as hereinbefore recited.

This surrender and conveyance is made subject to acceptance thereof by the said Commissioners of the Land Office.

IN WITNESS WHEREOF, the party of the First Part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officers the day and year first above written.

THE

COMPANY.

By

Attest:

Secretary.

STATE OF NEW YORK, }
COUNTY OF , } ss.:

On the day of in the year One Thousand Nine Hundred and Twenty-one, before me personally came , to me known; who being by me duly sworn, did depose and say: that he resided in City, New York; that he is the President of The Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

APPENDIX XVI.

RULES AND REGULATIONS OF THE COMMISSIONERS
OF THE LAND OFFICE GOVERNING GRANTS OF
ABANDONED CANAL LANDS, PURSUANT TO CHAP-
TER 299 OF THE LAWS OF 1916.

(Adopted June 13, 1917.)

CHAPTER 299.

AN ACT to amend the public lands law, in relation to the disposition of lands and structures owned by the state for canal purposes and no longer necessary or useful therefor.

Became a law April 25, 1916, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section thirty of chapter fifty of the laws of nineteen hundred and nine, entitled "An act relating to the public lands, constituting chapter forty-six of the consolidated laws," is hereby amended to read as follows:

§ 30. *Unappropriated state lands defined.* The term "unappropriated state lands," as used in this chapter, includes all state lands belonging to the common school fund; all escheated lands; all lands conveyed to the state for the benefit of the canal fund and not devoted in pursuance of law to any public use; all lands purchased by or for the state on the foreclosure of any mortgage given on the loan of any United States deposit funds or on any loan of money for the state; all state lands lying within the limits of any city or village not devoted to any public use; and all other lands belonging to this state which are not directed by law to be kept for or applied to any specific purpose, except lands under water the disposition of which is governed by article six of this

chapter and except lands the disposition of which is governed by the salt springs law and except abandoned canal lands the disposition of which is governed by article four of this chapter, and chapters eight hundred and ninety-three and eight hundred and ninety-four of the laws of nineteen hundred and eleven.

§ 2. The title of article four of such chapter is hereby amended to read as follows:

ABANDONED CANAL LANDS AND STRUCTURES.

§ 3. Section fifty of such chapter is hereby amended to read as follows:

§ 50. *Sale of abandoned canal lands.* The commissioners of the land office may sell and convey the right, title and interest of the state in and to any real property, acquired for canal purposes, which the canal board, by resolution, determine to have been abandoned for such purposes, including any real property, which, at the time it was taken for canal purposes, was owned by the state, and was thereafter conveyed by the state with adjoining lands without express reservation of the part covered by the canal, other than abandoned canals, sold and conveyed by the state prior to April twenty-seventh, eighteen hundred and sixty-nine, and other than dry docks within the canal blue lines in the city of Oswego, built by permission of the state, and other than lands and structures rendered useless for canal purposes by the improvement of state canals authorized by chapter one hundred and forty-seven of the laws of nineteen hundred and three and chapter three hundred and ninety-one of the laws of nineteen hundred and nine and the acts amendatory thereof and supplemental thereto, proceedings for the abandonment and sale of which are provided for in sections fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine and fifty-nine-a of this chapter, and chapters eight hundred and ninety-three and eight hundred and ninety-four of the laws of nineteen hundred and eleven. If such property is used at the time of such abandonment as a hydraulic canal, such conveyance shall not prevent the future use thereof for that purpose, but shall expressly reserve the right to continue the same. (Am. by Chap. 431, Laws of 1921.)

§ 4. Such chapter is hereby amended by adding at the end of article four nine new sections, to be sections fifty-two to fifty-nine-a, inclusive, to read, respectively, as follows:

§ 52. *Report of useless lands and structures.* Upon the completion of any portion of the improvement of the state canals authorized by chapter one hundred and forty-seven of the laws of nineteen hundred and three and chapter three hundred and ninety-one of the laws of nineteen hundred and nine and the acts amendatory thereof and supplemental thereto, and upon the placing in operation and use of such portion for navigation purposes, if any portion of the present canals for which the improved canal furnishes a substitute shall have become no longer necessary or useful as a part of the barge canal system of the state, as an aid to navigation thereon, or upon any portion of the said present canals ceasing to be necessary as part of the said barge canal system because of an alternative available water route, the state engineer and surveyor and superintendent of public works shall make a report to the canal board showing the portions or sections of the improved canals completed and placed in operation, and describing in detail the lands and structures owned by the state for canal purposes rendered or becoming no longer necessary or useful as parts of the barge canal system as an aid to navigation thereon or for public terminal purposes and stating the reasons why such lands and structures are no longer necessary or useful for such purposes.

§ 53. *Resolution of abandonment: appraisal.* Upon the filing with it of such report, the canal board may, by resolution adopted at a meeting at which the state engineer and surveyor and the superintendent of public works are present, determine and declare that it is proposed to abandon such lands or structures reported by the state engineer and surveyor and the superintendent of public works as no longer necessary or useful for canal purposes, and fixing a time when and place where interested municipalities, persons, firms and corporations shall be heard, and shall publish such resolution, with notice of the time and place of hearing, which time shall not be less than thirty days after the last date of publication as hereinafter provided. Such publication of such resolution and notice shall be made by publishing the same at least twice a week

for two successive weeks in the official state paper, and if such lands or structures proposed to be abandoned are situated wholly or in part in a city or incorporated village where a daily newspaper is published, such resolution and notice shall be published in any such paper at least twice a week for two successive weeks; but if there be no such newspaper published in such city or incorporated village, or such lands or structures are not situated wholly or in part in any city or incorporated village, then such resolution and notice shall be published in a newspaper published in each county in which the lands and structures to be abandoned, or any part thereof, are situated, at least once a week for two successive weeks.

In addition to such publication, such resolution and notice shall, within ten days of the date of the first publication, be served by mailing the same in a securely closed, post-paid wrapper, addressed to each municipality, person, firm or corporation who has filed with the canal board a request in writing that any such resolution and notice be so served on them.

After the hearing herein provided for, the canal board may, by resolution adopted by the affirmative votes of at least three members of the canal board in addition to the affirmative votes of the state engineer and surveyor and the superintendent of public works, abandon the lands and structures so reported and thereupon such lands or structures may be sold and conveyed by the state as in this article provided.

In case any lands or structures are abandoned for canal purposes as herein provided, the commissioners of the land office shall cause to be made an examination of such abandoned lands and structures for the purpose of ascertaining and determining the value of the right, title and interest of the state in the same for manufacturing, commercial or private purposes. Such examination and appraisal shall be made by a committee or by such other method as in the judgment of the commissioners will be for the best interests of the state, and a verified report, containing the results of such examination and appraisal, shall be made and filed with the secretary of state. Such appraisement shall be made in such a manner as to permit the sale of the lands and structures so appraised in accordance with the provisions of this article.

§ 54. *Sale to city or village.* The commissioners of the land office may sell and convey the right, title and interest of the state in and to any such lands or structures which have been abandoned and appraised pursuant to the provisions of section fifty-three. If any such lands or structures are situated within the limits of a city or incorporated village, and their use in whole or in part is desired by the city or incorporated village wherein they are situated, the commissioners of the land office may sell such lands or structures, in whole or in part, to such city or incorporated village at the appraised value thereof on such terms as may seem advantageous to the state, provided such city or village files with the commissioners of the land office, within four months after adoption of the resolution of abandonment provided for in section fifty-three of this chapter, a written notice of its intention to purchase the whole or a part of such lands or structures and any city or incorporated village so filing such notice shall be first entitled to purchase either the whole or a part of such lands or structures as may be indicated by such notice, provided such purchase is made within the time and upon the terms as to payment of the purchase price fixed by the commissioners of the land office. Any such city or incorporated village is hereby authorized to acquire such lands or structures and to provide means of payment therefor. (Am. by Chap. 810, Laws of 1920 and Chap. 418, Laws of 1921.)

§ 55. *Sale to owner of building.* The owner of a building located upon any lands situated in a city or incorporated village, so abandoned for canal purposes and not sold to a city or incorporated village as prescribed by section fifty-four, or upon any land or structures so abandoned for canal purposes and not within a city or incorporated village, which building shall have occupied such lands for five years prior to January first, nineteen hundred and sixteen, shall have a preferential right to acquire the land occupied by such building at the appraised value thereof, and the commissioners of the land office shall, on application and proof of occupation by such owner, convey to him at the appraised value the right, title and interest of the state in the land occupied by such building. The commissioners of the land office may serve upon the owner of any such building a notice stating that such land has been abandoned, the appraised value of the land occupied by such

building, and that the owner has a preferential right to purchase the same within a time specified in such notice. Such notice may be served personally upon such owner, or upon any adult person in charge of such building, or by attaching the same conspicuously to such building. The time specified in such notice shall not be less than three months after the service thereof. If within such specified time the owner of such building does not avail himself of the privilege of acquiring the land occupied by such buildings, the commissioners of the land office may dispose of such lands in such manner as is otherwise authorized by this article. Any city or incorporated village acquiring lands occupied by such buildings may sell the same at public or private sale. (Am. by Chap. 424, Laws of 1919.)

§ 56. *Sale at public auction.* Any lands or structures so abandoned for canal purposes, or parts thereof, situated within a city or incorporated village and not acquired by such city or incorporated village or by the owner of a building, within the time and in the manner hereinbefore provided, may, in the discretion of the commissioners of the land office, be sold at public sale to the highest bidder at not less than the appraised value, in separate parcels of not more than one-eighth of a mile in length, such parcels wherever practicable to correspond in length as nearly as may be feasible with the length of the blocks adjacent or nearest thereto, in the city or village where such lands or structures are situated. The determination of the commissioners of the land office as to whether the sale of parcels corresponding to such blocks is practicable, and as to whether the parcels sold do in fact correspond in length to such blocks, shall be final. Any lands or structures so abandoned for canal purposes and not situated within a city or incorporated village nor acquired by the owner of a building as hereinbefore provided may be sold by the commissioners of the land office at public sale to the highest bidder at not less than the appraised value, in such parcels or sections as the commissioners of the land office may determine. If at the time of the abandonment for canal purposes of any parcel of land not situated within a city, the title to the lands abutting on both sides of said parcels is in the same owner such parcel shall be sold subject to the perpetual right of such an owner to cross and recross such parcel so aban-

doned by means of a bridge, bridges or in such other way as the commissioners of the land office may determine. Such bridge, bridges or other ways of crossing shall be constructed and maintained by such abutting owner at his sole cost and expense.

§ 57. *Place, notice and conduct of sale.* Such public sale shall take place within the county where the lands or structures to be sold, or a part thereof, are situated. The commissioners of the land office shall fix a time when and place where such sale shall take place and shall publish a notice of such time and place of sale, which time shall not be less than thirty days after the last date of publication as hereinafter provided. Such notice shall contain a description of the lands or structures to be sold. Such publication shall be made at least twice a week for two successive weeks in the official state paper, and if such lands or structures proposed to be sold are situated wholly or in part in a city or incorporated village where a daily newspaper is published, such notice shall be published in any such newspaper at least twice a week for two successive weeks; but if there be no such newspaper published in such city or incorporated village, or if such lands or structures be not situated, wholly or in part, in any city or incorporated village, then such notice shall be published in a newspaper published in each county in which the lands or structures proposed to be sold, or any part thereof, are situated, at least once a week for two successive weeks. In addition to such publication such notice shall, within ten days of the date of the first publication, be served by mailing the same in a securely closed post-paid wrapper addressed to each person, firm or corporation who may have filed with the commissioners of the land office a request that any such notice of sale be served upon them.

§ 58. *Release of state from obligation of maintenance.* Each grant or conveyance made by the commissioners of the land office of such lands and structures abandoned for canal purposes shall contain a provision, as one of the conditions thereof, that the people of the state are released from all obligations for maintenance of any and all structures located in the conveyed section, and thereupon all liability on the part of the state for or on account of the maintenance thereof shall cease.

§ 59. *Disposition of proceeds.* The proceeds from a sale or grant of such lands or structures shall be applied to the cost of the improvement which renders such lands or structures no longer necessary, and any surplus from the sale of abandoned lands and structures above the cost of the entire improvement shall be applied to the sinking fund for the payment of the improvement bonds.

§ 59-a. *Records of canal board and of commissioners of land office.* A record of all papers filed with and of proceedings of the canal board or of the commissioners of the land office, pursuant to this article shall be kept by such board or commissioners respectively.

§ 5. This act shall take effect immediately.

Directions for procedure before the Commissioners of the Land Office to obtain letters-patent for Canal Lands declared abandoned by the Canal Board.

FIRST.—Proof must be furnished the Commissioners of the Land Office by a certified copy, under the seal of the State Comptroller, of the resolution of the Canal Board declaring the lands abandoned for canal purposes pursuant to Chapter 299 of the Laws of 1916. The Secretary of the Land Board shall request of the Canal Board copies of all written requests made to the Canal Board by all municipalities, persons, firms or corporations who may have desired that they be informed of any such resolution of abandonment, which copies shall be filed with the Commissioners of the Land Office.

SECOND.—Thereupon an examination and appraisal of such abandoned canal lands shall be made by the official appraisers of the Board, who shall file their verified report with the Secretary of State. Such appraisal shall be made in such parcels as shall be recommended by the State Engineer and Surveyor, who shall file with the Commissioners of the Land Office proper maps and descriptions of such parcels.

THIRD.—The Canal Board shall report to the Commissioners of the Land Office a complete list of all buildings and structures located upon said abandoned canal lands, with the names and post office addresses of the several owners thereof, as said list is filed with the Canal Board by the Superintendent of Public Works,

for the purpose of enabling the Commissioners of the Land Office to serve notices of abandonment and of the appraised value of the lands occupied by said buildings and structures and that the owners of said buildings and structures have preferential rights in lands outside of a city or village, or in lands within a city or village not applied for by the municipality, upon the owners of said buildings and structures, as required by law.

FOURTH.—The Secretary of the Land Board shall promptly serve by mail notices of the abandonment of such canal lands within the limits of any city or incorporated village, upon the mayor of such city or president of such village, and also upon the reputed owners of buildings and structures located upon any such lands in a city or village, and also of the abandonment of lands outside of municipalities upon the reputed owners of buildings and structures erected on such lands outside of a city or village prior to January 1, 1916, and at the same time notify such municipality and owner of buildings and structures of their preferential rights under Sections 54 and 55 of Chapter 299, Laws of 1916, and shall also state in said notices the appraised valuation of the respective parcels and specify therein the time within which such municipality and owner shall avail themselves of the privilege of acquiring the lands to which they may have a preferential right under said act.

FIFTH.—Before any grant shall be made to the owner of any building or structure located upon abandoned canal lands, such owner shall produce due proof that such building has occupied said lands continuously for five years prior to January 1, 1916, and that he is the owner of such building.

SIXTH.—Notices of sale at public auction of lands not sold to municipalities or to the owners of buildings thereon, in addition to the publication required by law, shall be served by mail by the Secretary of the Land Board on such persons, firms or corporations who may have filed with the Canal Board or Land Board a request that any such notice of sale be served upon them.

SEVENTH.—Every such grant or conveyance shall contain a provision, as one of the conditions thereof, that the people of the State are released from all obligations for maintenance of any and all structures located in the conveyed section, and thereupon all liabil-

ity on the part of the State for or on account of the maintenance thereof shall cease.

EIGHTH.—That every such grant or conveyance shall contain a provision requiring the grantee to drain such lands, when requested to do so by the State Engineer and Surveyor, in a manner and according to plans and specifications to be drawn up or approved by the State Engineer.

NINTH.—That every such grant or conveyance shall contain a covenant on the part of the patentee running with the land that the said patentee, his heirs and assigns, will forever release the State from any and all claims for damages by reason of percolation or overflow from the canal to the lands thereby granted and adjoining lands.

TENTH.—That all conveyances of abandoned canal lands shall be by quit-claim patent, and the fee for every such patent shall be five dollars.

NOTE.—Consult Secretary of State for any amendments or changes.

APPENDIX XVII.

RECONVEYANCE OF BARGE CANAL LANDS.

The Attorney-General presented the following communication to the Canal Board outlining the plan of procedure for the reconveyance of lands heretofore appropriated for the purposes of the Barge canal system, and upon motion it was resolved to accept the plan as outlined as the policy of the Board.

First. (a) All informal requests for reconveyances, to whatsoever State officer or board same may be made, should, in the first instance, be referred to the Superintendent of Public Works, who should thereupon secure the advice of the State Engineer as to whether the lands in question are any longer necessary for Barge canal purposes.

(b) Likewise, if the State Engineer, without any request for a reconveyance, considers that any lands are no longer needed for Barge canal purposes, he should refer the matter to the Superintendent of Public Works for the purpose of negotiating with the former owner.

Second. (a) All such requests, if the State Engineer advises that such lands are no longer needed, and

(b) All such matters referred by the State Engineer to the Superintendent of Public Works, should then be taken up with "the owner from whom the property * * * was taken, his heirs, successors in interest or assigns," and the necessary petition secured. (Forms attached.)

This may be done through the Special Examiner and Appraiser.

Third. If a petition is made, and if same is satisfactory to the Superintendent of Public Works, it should be referred to the Attorney-General to report the title to the premises in question.

Fourth. On the return of the petition to the Superintendent of Public Works, by the Attorney-General, with his report, if same is satisfactory, the petition should be referred to the Canal Board, and by it to the State Engineer.

Fifth. The State Engineer should thereupon certify that the lands are no longer needed for canal purposes, and should also **prepare a map** covering such lands, and present the same to the Canal Board.

Sixth. Thereupon the Canal Board may by resolution approve such map and authorize the Superintendent of Public Works to reconvey the lands in question, on such terms as it deems just.

(Forms "First" and "Second.")

PETITION TO CANAL BOARD FOR A RECONVEYANCE OF ALL OR
PART OF APPROPRIATED LANDS.

(Before Payment)

Whereas, The State of New York heretofore appropriated certain lands situate in the County of and reputed to be owned by under appropriation map No., payment for same not having been made.

Now Therefore, The undersigned, the former owner of said lands, hereby petition the Canal Board to cause to be reconveyed to the undersigned, said lands so appropriated or so much thereof as are not needed or are deemed to be unnecessary for canal purposes.

In consideration of such reconveyance, the undersigned agree to release the State of New York of and from any and all claims for damages on account, or growing out of the appropriation of said lands to be so reconveyed, on the payment by the State of New York, to the undersigned, of the sum of \$....., per acre.

In witness whereof, the undersigned ha hereunto set hand and seal on this day of, 191 .

.....[L. S.]

.....[L. S.]

STATE OF NEW YORK, }
County of } ss:

On this day of, 191 , before me personally came, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

.....
.....

(Matter underscored to be stricken out
on reconveyance of *all*.)

(Form "Third.")

PETITION TO CANAL BOARD FOR A RECONVEYANCE OF ALL OR
PART OF APPROPRIATED LANDS, SAME TO BE FLOODED.

(Before Payment)

Whereas, The State of New York heretofore appropriated certain lands situate in the County of and reputed to be owned by under appropriation map No., payment for same not having been made.

Now Therefore, The undereigned, the former owner

of said lands, hereby petition the Canal Board to cause to be reconveyed to the undersigned, said lands so appropriated or so much thereof as are not needed or are deemed to be unnecessary for canal purposes.

In consideration of such reconveyance, the undersigned agree to release the State of New York of and from any and all claims for damages on account, or growing out of the appropriation of said lands to be so reconveyed, on the payment by the State of New York to the undersigned, of the sum of \$..... per acre. and the undersigned further agree in consideration of the payment of said sum of money, that the State of New York may retain and have the right to flood such lands to be so reconveyed.

In witness whereof, the undersigned ha hereunto set hand and seal on this day of, 191 .

.....[L. S.]

.....[L. S.]

STATE OF NEW YORK, }
County of } ss:

On this day of, 191 , before me personally came to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

.....
.....

(Matter underscored to be stricken out
on reconveyance of *all*.)

(Forms "A" and "B.")

PETITION TO CANAL BOARD FOR A RECONVEYANCE OF ALL OR PART OF APPROPRIATED LANDS.

(After Payment)

Whereas, The State of New York heretofore appropriated certain lands situate in the County of and reputed to be owned by under appropriation map No., payment for same having heretofore been made.

Now Therefore, The undersigned, the former owner of said lands, hereby petition the Canal Board to cause to be reconveyed to the undersigned, said lands so appropriated or so much thereof as are not needed or are deemed to be unnecessary for canal purposes.

In consideration of such reconveyance the undersigned agree to pay to the State of New York for said lands the sum of \$..... per acre.

In witness whereof, the undersigned ha hereunto set hand and seal on this day of, 191 .

.....[L. S.]

.....[L. S.]

STATE OF NEW YORK, }
County of } ss:

On this day of, 191 , before me personally came to me known to be the individual described in

and who executed the foregoing instrument and acknowledged
to me that he executed the same.

.....
.....

(Matter underscored to be stricken out
on reconveyance of *all*.)

(Form "C.")

PETITION TO CANAL BOARD FOR A RECONVEYANCE OF ALL OR
PART OF APPROPRIATED LANDS, SAME TO BE FLOODED.

(After Payment)

Whereas, The State of New York heretofore appropriated certain lands
situate in the County of and reputed to be owned by
under appropriation map No. payment for same having heretofore
been made.

Now Therefore, The undersigned, the former owner
of said lands, hereby petition the Canal Board to cause to be reconveyed to
the undersigned, said lands so appropriated or so much thereof as are not
needed or are deemed to be unnecessary for canal purposes.

In consideration of such reconveyance, the undersigned agree to pay to
the State of New York for said lands the sum of \$..... per acre, and
further agrees that the State may retain and have the right to flood such
lands to be so reconveyed.

In witness whereof, the undersigned ha hereunto set hand and
seal on this day of, 191 .

.....[L. S.]
.....[L. S.]

STATE OF NEW YORK, }
County of } ss:

On this day of, 191 , before me personally came
....., to me known to be the individual described in
and who executed the foregoing instrument and acknowledged
to me that he executed the same.

.....
.....

(Matter underscored to be stricken out
on reconveyance of *all*.)

(Miscellaneous Form.)

PETITION TO CANAL BOARD FOR A RECONVEYANCE OF APPRO-
PRIATED LANDS.

(Miscellaneous Form)

Whereas, The State of New York heretofore appropriated certain lands
situated in the County of and reputed to be owned by
under appropriation Map No., same being
a permanent appropriation, and

Whereas, The State of New York heretofore appropriated certain lands
situated in the County of and reputed to be owned by

..... under appropriation Map No., same being
a temporary appropriation, so called, and

Whereas, Said permanent appropriation deprives the owner of access to the
lands temporarily appropriated,

Now, Therefore, The undersigned, the former owner
of said lands, hereby petition the Canal Board to cause to be reconveyed to
the undersigned said lands so temporarily appropriated together with the
right of way therefrom feet wide, over and across said lands so
permanently appropriated.

In consideration of such reconveyance, the undersigned agrees to release
the State of New York of and from any and all claims for damages on
account, or growing out of said appropriations on the payment by the State
of New York, to the undersigned, of the sum of \$.....

In witness whereof, the undersigned ha hereunto set hand and
seal on this day of, 191 .

.....[L. S.]

.....[L. S.]

STATE OF NEW YORK, }
County of } ss:

On this day of, 191 , before me personally came
....., to me known to be the individual described in
and who executed the foregoing instrument and acknowledged
to me that he executed the same.

.....
.....

APPENDIX XVIII.

THIS INDENTURE, made this day of,
 one thousand nine hundred and, between

 of the of, County of,
 State of New York, party of the first part, and the State of New
 York, party of the second part, WITNESSETH:

WHEREAS, The Superintendent of Public Works and the State
 Engineer are, by the provisions of Chapter 147 of the Laws of 1903,
 and acts amendatory thereof, or by Chapter 391 of the Laws of
 1909, and acts amendatory thereof, directed and required to
 improve the canal from
 to and,

WHEREAS, The party of the first part hereto is the owner of
 certain lands of which the parcel hereinafter mentioned and
 described is a part, and

WHEREAS, In order to carry out the provisions of the said acts
 it is desired by the State Engineer and Surveyor to deposit upon
 the hereinafter mentioned lands dirt and other materials to be
 excavated in the course of the construction of said canal,

NOW THEREFORE, The party of the first part, in consideration
 of the sum of One Dollar to him in hand paid at or before the
 ensealing and delivery of these presents, and for other valuable
 consideration, the receipt of all of which is hereby acknowledged,
 does hereby grant and convey unto the party of the second part
 and to the contractors with the party of the second part for the
 construction of said portion of the Barge Canal, including the
 successors and representatives or assigns of such contractors, the
 right to enter upon the lands hereinafter mentioned and to deposit
 thereon dirt and other materials to be excavated in the course of
 the construction of the said canal, giving and granting to said
 parties for that purpose a right of way over and across any lands

of the party of the first part intervening between such spoil lands and the Barge Canal.

And the party of the first part does hereby further release and forever discharge the party of the second part and the contractors with the party of the second part for the construction of said or any portion of the Barge Canal, of and from any and all liability, and damages and claims for damages or compensation growing directly or indirectly out of the use or occupancy of said lands for the purposes aforesaid, or out of the deposit thereon of spoil or materials excavated in the course of the construction of said canal.

The lands hereinbefore referred to are situate in the Town of, County of, State of New York, and are bounded and described as follows, to wit:

(DESCRIPTION)

This grant and release is given upon the following terms and conditions, namely:

1. That the top surface of the soil to be deposited as aforesaid shall not extend above elevation feet of the Barge Canal levels.

2. That the spoil when deposited shall be leveled and trimmed to substantially even and continuous planes.

3. This grant and lease to bind the heirs and assigns of the party of the first part.

IN WITNESS WHEREOF, The party of the first part has hereunto set his hand and seal the day and year first above written.

..... [L.S.]
..... [L.S.]

THE STATE OF NEW YORK

By.....
Superintendent of Public Works.

(Approved).....
State Engineer and Surveyor.

STATE OF NEW YORK, }
County of } ss.:

On this day of, 191..., before me personally came and appeared to me

known to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

.....

Notary Public.

I certify that by resolution duly adopted at a meeting of the Canal Board of the State of New York, held the day of, 191.., the Superintendent of Public Works was duly authorized, with the approval of the State Engineer and Surveyor, to enter into the above agreement.

....., 191..

.....

Secretary of Canal Board.

APPENDIX XIX.

RULES OF THE COURT OF CLAIMS OF THE STATE
OF NEW YORK.

(Adopted November 8, 1916)

(In Effect January 1, 1917)

RULES OF PRACTICE.

1. Amendments.
2. Answers.
- 3, 4, 5. Appeals.
6. Attorney, when party represented by.
7. Briefs.
- 8, 9, 10. Calendar of claims.
- 11, 12. Claim.
13. Clerk.
14. Counterclaim.
15. Date of issue.
16. Disbursements for appropriation maps.
17. Discontinuance.
18. Dismissal of claim or counterclaim.
19. Exhibits.
20. Guardian *ad litem*.
21. Judgments.
22. Maps.
23. Notice of intention to file claim.
24. Number of claim.
25. Orders.
26. Reply.
27. Size of papers.
28. Submission of claim on agreed statement of facts.

APPENDIX TO RULES.

I. FORMS.

- A. Notice of intention to file claim.
- B. Claim for permanent appropriation.
- C. Claim for damages for negligence.
- D. Claim for damages for leakage.
- E. Judgment in appropriation claims.
- F. Judgment in claims other than appropriation claims.

See pages 360, 468.

II. PROCEDURE TO SECURE PAYMENT OF JUDGMENTS.

- A. In claims other than appropriation claims.
- B. In permanent appropriation claims.

AMENDMENTS.

RULE 1.—Claims, counterclaims and replies may be amended upon order of the court or a judge thereof.

The order granting the amendment must set forth verbatim the amended part or parts of the pleading and by the necessary references to the original pleading must indicate where the changes in the original pleading are made.

The amended pleading must recite on its face the date when the order permitting the amendment was granted.

Except when the order permitting the amendment is made during the course of the trial of a claim or counterclaim, or unless the order permitting the amendment otherwise directs, the party securing the order must file in the clerk's office at Albany within ten days after the order permitting the amendment is granted an original and twelve copies of the entire pleading as amended, and he must within the same time serve upon the adverse party a duplicate original thereof.

ANSWERS.

RULE 2.—The state is not required to answer a claim and all allegations in the claim are treated as denied.

APPEAL.

RULE 3.—Except as otherwise directed by these rules, the practice on appeal shall be the same as that in the supreme court and court of appeals.

RULE 4.—The successful party on appeal must file in the clerk's office of the court of claims at Albany the original printed case on appeal together with a certified copy of the order of the appellate court remitting the proceedings to the court of claims within ten days after said order is filed in the clerk's office of said appellate court, together with (1) an original and two copies of his proposed order making the order or judgment of the appellate court the order or judgment of the court of claims, and (2) an original and two copies of his proposed judgment of the court of claims based on said order. If the successful party on appeal

fails to comply with this rule, the adverse party may make application to the court of claims for the entry of the appropriate orders and judgments.

RULE 5.—When costs on appeal are allowed by the appellate court, the successful party on appeal must within the time stated in Rule 4 file in the clerk's office of the court of claims at Albany his proposed bill of costs, and at the same time serve upon the adverse party a copy thereof, together with notice of taxation of costs, which shall be not less than five nor more than ten days thereafter.

When costs on appeal are allowed by the appellate court, the same may be stipulated by the parties, and if not so stipulated shall be taxed by the clerk of the court of claims in like manner as costs are taxed in the supreme court.

ATTORNEY, WHEN PARTY REPRESENTED BY.

RULE 6.—Whenever under these rules a party to a claim is directed to do an act, or service of any paper or notice is directed to be made upon any party to a claim, if said party is represented by an attorney said act must be done by said attorney and said service must be made upon said attorney.

BRIEFS.

RULE 7.—Whenever either party desires to submit a brief or the court directs the submission thereof, the party submitting the same must serve a copy upon the adverse party within the time prescribed by the court for that purpose, or if the time is not so prescribed, within twenty days after the completion of the trial or the hearing of the application, in connection with which the brief is submitted. If either party desires to submit a reply brief, the party submitting the same must serve upon the adverse party a copy of said reply brief within ten days after the service upon him of the brief to which his brief is a reply.

Whenever either party to a claim serves upon the adverse party, pursuant to this rule, any brief he must at the same time send to the clerk's office at Albany four copies thereof. The clerk shall upon the receipt thereof send one copy to each of the judges hearing the claim and shall file the remaining copy or copies in his office.

All briefs must recite on their face when and where the claim was tried, or the application made, and before which judge or judges.

CALENDAR OF CLAIMS.

RULE 8.—The district calendar shall be made up for each of the districts mentioned below of the claims arising within the counties named:

Albany District

Albany	Hamilton	Saratoga
Bronx	Kings	Schenectady
Broome	Montgomery	Schoharie
Clinton	Nassau	Suffolk
Columbia	New York	Sullivan
Delaware	Orange	Tioga
Dutchess	Putnam	Ulster
Essex	Queens	Warren
Franklin	Rensselaer	Washington
Fulton	Richmond	Westchester
Greene	Rockland	

Utica District

Chenango	Lewis	Otsego
Herkimer	Oneida	St. Lawrence

Syracuse District

Cayuga	Madison	Seneca
Cortland	Onondaga	Tompkins
Jefferson	Oswego	

Rochester District

Chemung	Ontario	Steuben
Livingston	Orleans	Wayne
Monroe	Schuyler	Yates

Buffalo District

Allegany	Erie	Wyoming
Cattaraugus	Genesee	
Chautauqua	Niagara	

RULE 9.—The clerk shall prepare a calendar for each regular term of the court as directed by section 284 of the code of civil procedure of all claims which are filed in his office at Albany at least thirty days before the commencement of the term for which the calendar is made up; and he shall prepare a calendar of

claims for each special term of the court as directed in writing by the presiding judge.

No claim shall be added to the calendar except by written order of the court (1) upon the written consent of both parties, or (2) upon written notice, stating the reasons for the application, served upon the adverse party at least eight days before the opening of the term of court for which the calendar is made up. Copies of the application papers must be sent to the clerk's office at Albany at the same time that they are served upon the adverse party.

Whenever any claim is added to the calendar for a district other than the one in which said claim arose, such addition shall be in force only during the term at which the claim is added to the calendar, and at the end of said term, if said claim has not been disposed of, it shall resume its regular place on the calendar for the district in which it arose.

RULE 10.—Unless the court otherwise directs, the first day calendar shall consist of such claims as shall be announced as ready for trial by either party upon the formal call of the calendar on the opening day of the term. From time to time during the continuance of said term, the court may in its discretion add to such original day calendar other claims upon the general calendar. The representative of the attorney-general's office in charge at said term of court shall immediately notify the attorneys for the respective claimants of such addition of claims to the day calendar.

CLAIM.*

RULE 11.—The claim must state concisely the facts constituting the same, the nature and extent of the interest, and the post-office address, of each claimant therein.

It must state whether or not the claim, or any part thereof, has been assigned, and if assigned the name and post-office address of each person interested in the claim, and the nature and extent of such interest.

It must state whether or not it has been submitted to any other tribunal or officer for audit or determination, and if so to

* For suggested forms for claims, see the appendix to these rules.

what tribunal or officer, and the determination of such tribunal or officer therein.

In all cases where a notice of intention to file a claim is required by law, the claimant, before filing said claim in the clerk's office at Albany, must attach to the original and to the twelve copies thereof a copy of said notice of intention, and the claim must state the date of filing of such notice both in the office of the clerk of the court of claims and in the office of the attorney-general.

Where the claim is for the temporary or permanent appropriation of property, it must contain a specific description of the property, giving its location and quantity.

There must be included in each claim, or attached thereto as a part thereof, a schedule showing in detail each item claimed, and the amount of such item.

If the claim is filed under a special statute, such statute must be set out in full in the claim.

The claim must be signed at the end thereof by the claimant's attorney, giving the attorney's post-office address.

It must be verified in the same manner as pleadings in the supreme court.

The original may be either typewritten or printed, but where the amount claimed exceeds \$500 the copies must be printed.

RULE 12.—A claim shall be filed by delivering it at the clerk's office in Albany to the clerk or in his absence to some person in charge of the office, or upon the receipt thereof at the clerk's office in Albany by mail or by express. At the time of filing the original claim or within ten days thereafter the claimant must file in the clerk's office at Albany twelve copies thereof.

CLERK.

RULE 13.—The duties of the clerk, unless otherwise ordered in writing by the court, shall be as follows: 1. He shall receive and file all papers in a claim which comply with the statutes and rules relating thereto. 2. He shall number each claim in the order of its filing, and give each amended or supplemental claim and other papers in the claim the same number as the original claim. 3. He shall deliver three copies of each claim to the attorney-general and four to the superintendent of public works, and shall retain the remaining copies for the use of the court.

4. He shall notify the claimant or his attorney of the date of filing a claim and of its number. 5. He shall mail a copy of the calendar at least five days before the beginning of the term to each claimant whose claim appears thereon, or to his attorney. 6. He shall cause to be entered in appropriate books all papers which are required to be recorded and shall have the care and custody of such books and of all papers filed in his office. 7. He shall perform such other duties as may be prescribed by the court or not inconsistent therewith by any judge of the court.

COUNTERCLAIM.

RULE 14.—Where a counterclaim is necessary the attorney-general must plead the counterclaim in conformity with the provisions relating to claims so far as applicable. A counterclaim must be verified by the attorney-general or by one of his deputies.

Unless otherwise permitted by the written order of the court or a judge thereof, the attorney-general must, at least ten days before the beginning of the term at which the claim is to be tried, file in the clerk's office at Albany an original and five copies of the counterclaim and must at the same time that he files said counterclaim serve a duplicate original thereof upon the claimant.

DATE OF ISSUE.

RULE 15.—The date of issue is the date of filing the claim in the clerk's office at Albany.

DISBURSEMENTS FOR APPROPRIATION MAPS.

RULE 16.—An allowance will be made in the judgment in appropriation claims for the actual expense incurred by the claimant in securing copies of the official appropriation maps required to be attached to appropriation claims under the rules only when such expense is proven or stipulated in open court and included in the award.

DISCONTINUANCE.

RULE 17.—Where a counterclaim is pleaded the claimant cannot discontinue except as permitted by the written order of the court or a judge thereof.

DISMISSAL OF CLAIM OR COUNTERCLAIM.

RULE 18.—An application may be made to the court to dismiss a claim or a counterclaim in whole or in part on the ground

(1) that said claim or counterclaim, or a part thereof, does not state facts sufficient to constitute a cause of action, or (2) that the court does not have jurisdiction of said claim or counterclaim, or a part thereof, either with respect to one or more of the parties thereto or with respect to the subject matter thereof. Unless said application is made during the trial of said claim or counterclaim, it will not be entertained by the court except on eight days written notice to the adverse party stating the grounds therefor, unless the adverse party waives or modifies this requirement.

EXHIBITS.

RULE 19.—Each party must, before submitting to the court an exhibit, mark conspicuously on said exhibit the number of the claim and claimant's name.

In all litigated claims each party must within five days after the claim is finally submitted, file in the clerk's office at Albany five copies of a list of all exhibits submitted by him to the court. Such list must sufficiently describe said exhibits so as to permit the identification thereof and must give the official number or symbol attached to each exhibit by the court stenographer; it must recite on its face when and where the claim was tried and before which judge or judges, and shall be signed at the end thereof by the attorney for the party submitting the same. The clerk shall send one copy of said list to each of the judges hearing the claim and shall file the remaining copies in his office.

Each party shall retain and be responsible for his own exhibits, but the clerk of the court may at any time require the exhibits, or any of them, to be filed in the clerk's office at Albany for the use of the court or of either party to the claim. Upon the issuing of a certificate of no appeal by the attorney-general in any claim, or after the expiration of the time for taking an appeal therein, the clerk may return to the party the exhibits sent by said party to the clerk's office.

GUARDIAN AD LITEM.

RULE 20.—A guardian ad litem may be appointed by the court, or one of the judges thereof, as provided by the rules of practice of the supreme court.

JUDGMENTS.*

RULE 21.—The successful party must within five days after receipt from the clerk of a notification of the award of the court submit to the clerk an original and two copies of his proposed judgment. If said party fails to do so, the adverse party may submit such proposed judgment.

Unless otherwise ordered by the court or a judge thereof, the judgment in appropriation claims shall not be entered until the attorney-general files in the clerk's office at Albany his written approval of title to the property appropriated by the state, including his direction as to the claimant or claimants in whose name judgment should be entered. In all other cases judgment shall be entered by the clerk as soon as the proposed judgment is submitted to him pursuant to this rule, or in default thereof as soon as practicable thereafter.

MAPS.

RULE 22.—In appropriation claims, the claimant, before filing the claim in the clerk's office at Albany, must attach to the original and to the twelve copies thereof a duplicate of the official appropriation map or maps filed in the office of the state engineer and covering the property for which the claim is filed.

In other claims affecting real property, and in negligence claims, a rough sketch or drawing showing the location of the premises affected, or the place where the claimant alleges that the accident occurred, must be so attached.

NOTICE OF INTENTION TO FILE A CLAIM.

RULE 23.—In addition to the requirements prescribed by section 264 of the code of civil procedure for a notice of intention to file a claim, every notice of intention must state on its face the post office address of each claimant therein and the post office address of the attorney for each claimant.

NUMBER OF CLAIM.

RULE 24.—The number given to the claim by the clerk when the same is filed in his office must be indicated on the face of all subsequent papers in the same proceedings filed in the clerk's office or submitted to the court by the party filing or submitting the same.

* For suggested forms for judgments and for the procedure necessary to secure payment of judgments, see the appendix to these rules.

ORDERS.

RULE 25.—Whenever either of the parties to a claim shall apply to the court or a judge thereof for an order, it shall be the duty of the party making the application (1) to present to the judge or judges to whom the application is made his proposed order in writing and (2) to send to the clerk's office at Albany three copies of said proposed order. When said order, signed by the judge or judges to whom it is presented, is filed in the clerk's office, the clerk shall send to the respective parties certified copies thereof.

Except when an order is applied for during the trial of a claim, no application shall be made to the court or a judge thereof for any order except on eight days written notice to the adverse party, stating the grounds therefor, unless the adverse party waives or modifies this requirement.

REPLY.

RULE 26.—A counterclaim is admitted unless a reply is filed and served as prescribed by these rules. A reply must be verified in the same manner as pleadings in the supreme court.

Unless otherwise permitted by the written order of the court or a judge thereof, the claimant must, within twenty days after the service upon him by the attorney-general of a counterclaim, file in the clerk's office at Albany an original and twelve copies of his reply and must at the same time that he files said reply serve a duplicate original thereof upon the attorney-general.

SIZE OF PAPERS.

RULE 27.—Where a claim or other paper in a case is typewritten the size of the paper used shall be substantially eight inches by thirteen inches and when printed substantially eight inches by ten and one-half inches.

SUBMISSION OF CLAIM ON AGREED STATEMENT OF FACTS.

* RULE 28.—Whenever a claim is submitted to the court on an agreed statement of facts, the claimant must within five days thereafter file in the clerk's office at Albany a copy of said statement which must be signed at the end thereof by both parties, together with a memorandum stating when and where the claim was submitted and to which judge or judges. Each party must

within the same time file in the clerk's office at Albany a list of all papers submitted by said party to the court, which list must sufficiently describe said papers so as to permit the identification thereof.

APPENDIX TO RULES

I. The following forms are suggested as aids to claimants.*

FORM A.

NOTICE OF INTENTION TO FILE CLAIM.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE <i>against</i> THE STATE OF NEW YORK.	}	Notice of intention to file claim
--	---	--------------------------------------

To the Clerk of the Court of Claims:

To the Attorney-General of the State of New York:

Please take notice that the undersigned, John Doe, intends to file a claim against the State of New York, pursuant to section 264 of the Code of Civil Procedure.

The post-office address of the claimant herein is

The attorney for the claimant herein is Richard Roe, Esq., and his post-office address is

The time when and the place where such claim arose and the nature of the same are as follows:

.....

JOHN DOE,
Claimant.

RICHARD ROE,
Attorney for claimant.

STATE OF NEW YORK County of City of	}	ss.:
---	---	------

John Doe, being duly sworn, says: I am the claimant above named; I have read the foregoing notice of intention to file a claim against the State of New York and know its contents; the same is true to my own knowledge,

* This appendix is not a part of the rules and has not been adopted by the court. The forms are not official forms and their use is not mandatory except to the extent that they incorporate provisions required by the rules. (See Rule 1, paragraph 3, and Rule 11.) They are obviously intended to cover only the ordinary situations, and claimants must modify them if necessary to meet the actual facts involved in their particular claims.

except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN DOE.

Sworn to before me the

day of, 191..

JOHN SMITH,

Notary Public (or other officer authorized to take affidavits).

FORM B.

CLAIM FOR PERMANENT APPROPRIATION.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE

against

THE STATE OF NEW YORK.

} Claim No.

1. The post-office address of the claimant herein is
2. This claim is for the permanent appropriation of land by the State for the Barge canal pursuant to Laws of 1903, chapter 147, as amended, and the notice of such appropriation was served upon the claimant on the day of, 191..*
3. The claimant was at the time of the appropriation the sole owner in fee of the premises appropriated.
4. The premises appropriated are described as follows: (Insert description in detail as given on the official appropriation map including the contract number and the parcel number indicated on said map.)
5. Attached hereto as a part of the claim is a duplicate of the official appropriation map served upon the claimant.
6. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.
7. This claim is filed within two years after the claim accrued, as required by law.**

* See note 2 indicating how this paragraph must be changed if the land was appropriated under other statutes or for other than barge canal purposes.

** If the claim is not filed within two years after it originally accrued, but is filed pursuant to any statute (such, for instance, as Laws 1916, ch. 420) which permits the claim to be filed after the expiration of the two years, this paragraph should be modified so as to state the exact facts and a specific reference to the statute permitting the filing of the claim should be made. If this statute is a special statute (as distinguished from a general statute) it must be set out in full in the claim. See Rule 11, paragraph 7.

8. The particulars of claimant's damages are as follows:

3 acres of land appropriated.....	\$450
15 acres of remaining land damaged.....	300

Total.	<u>\$750</u>
----------------	--------------

RICHARD ROE,

Attorney for Claimant.

Office and post-office address,

.....

STATE OF NEW YORK

County of

City of

} ss.:

John Doe, being duly sworn, says: I am the claimant above named; I have read the foregoing claim and know its contents; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN DOE.

Sworn to before me the

day of, 191..

JOHN SMITH,

Notary Public (or other officer authorized to take affidavits).

FORM C.

CLAIM FOR DAMAGES FOR NEGLIGENCE.

* * * * *

FORM D.

CLAIM FOR DAMAGES FOR LEAKAGE.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE

against

THE STATE OF NEW YORK.

} Claim No.

1. The post-office address of the claimant herein is

2. This claim is for the destruction of crops and damage to meadow land, owned by the claimant, due to leakage from the Barge canal from the day of, 191.., to the day of, 191.., by reason of the negligent construction and maintenance of the banks thereof by the State of New York.

3. The premises owned by claimant are situated in the town of, county of, New York, and consist of fifty acres, and the portion affected by the negligence of the State is about thirty-five acres lying adjacent to the canal.

4. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

5. Attached hereto is a copy of the notice of intention to file this claim, which notice was filed in the office of the clerk of the Court of Claims on the day of, 191., and in the office of the Attorney-General on the day of, 191..

6. This claim is filed within two years after the claim accrued, as required by law. * * *

7. Attached hereto as a part of the claim is a sketch of the entire premises owned by the claimant which also shows the portion affected by the negligence of the State.

8. The particulars of claimant's damages are as follows:

20 acres of corn totally destroyed, at \$30 an acre..	\$600
10 acres of potatoes partially destroyed, at \$60 an acre	600
5 acres of meadow land damaged, at \$10 an acre..	50
Total.	<u>\$1,250</u>

RICHARD ROE,

Attorney for Claimant.

Office and post-office address,

.....

.....

(For verification, see Form B.)

FORM E.

JUDGMENT IN APPROPRIATION CLAIMS.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE

against

THE STATE OF NEW YORK.

} Claim No.

....., attorney for claimant.

....., Deputy Attorney-General, for the State of New York.

This claim for the sum of (\$.....) for damages resulting from the permanent appropriation on the day of, 191.. (see note 1*), of the premises described below, situated in the, for the Barge canal, pursuant to chapter 147 of the Laws of 1903, as amended (see note 2*), filed the day of, 191., and numbered, came on to be heard

before this court at a session thereof held in the city of
on the day of, 191..

The court having heard the proofs and allegations of the parties and having duly made and filed its findings of fact and conclusions of law, it is (see note 3*)

Ordered and adjudged, That, the above named claimant, recover herein against the State of New York the sum of (\$.....), with interest thereon from the day of, 191.., the date of said appropriation, to the day of, 191.. (see note 4*) the date of entry of this judgment, to wit: (see note 4*) (\$.....), together with the sum of \$....., the cost of procuring maps, amounting in all to the sum of (see note 4*) (\$.....) for the permanent appropriation of the following described premises and in full settlement of said claim:

Contract No., Parcel No.

(Insert here the exact description of the premises appropriated as given in the official appropriation map served on the claimant)
.....
.....

Clerk of the Court of Claims.

NOTES ON THE DRAFTING OF JUDGMENTS IN APPROPRIATION CLAIMS.

NOTE 1. Insert here the date when the notice of appropriation was served upon claimant.

NOTE 2. If the land was appropriated for the Cayuga and Seneca canal, the statutory reference should be to Laws 1909, ch. 391, as amended; and if for barge canal terminals, to Laws 1911, ch. 746, as amended.

If the land was appropriated for other than barge canal purposes, this part of the judgment should of course be changed to conform to the facts. For instance, provision is made for the appropriation of land for the state reservation at Saratoga Springs by Laws 1916, ch. 295, §§ 600-604 (see Laws 1909, ch. 569; Laws 1911, ch. 394; Laws 1914, ch. 252), and for the appropriation of land within the Adirondack or Catskill parks or adjacent thereto by Laws 1916, ch. 451 (see Laws 1909, ch. 24, §§ 46-49; Laws 1912, ch. 444).

NOTE 3. Where no proof is offered by the state in opposition to the claim, this paragraph of the judgment should read as follows:

The court having heard the proofs and allegations of the claimant and having determined the legal liability of the state, and the claimant having offered to accept the sum of (\$.....) with interest thereon from the day of, 191.., together with the sum of \$....., the cost of procuring maps, in full settlement of said claim, and no proof having been offered by the state in opposition thereto, it is

NOTE 4. In submitting judgments to the clerk's office pursuant to Rule 21, this space should be left blank. The clerk, "unless otherwise ordered by the

* See the notes on the drafting of judgments in appropriation claims which follow this form.

court or a judge thereof," is not authorized to enter judgment in permanent appropriation claims until the attorney-general has filed in the clerk's office his written approval of title, etc., to the land appropriated. (See Rule 21.) The clerk's office will fill in the date of the entry of the judgment, will compute the interest down to the date of the entry of the judgment, or as otherwise directed by the court, and will insert in the judgment the amount of interest and the total amount of the judgment. See section 269 of the code of civil procedure relative to the allowance by the state comptroller of interest on judgments.

GENERAL NOTE. The suggested form of judgment is obviously intended to cover only the ordinary situation. When any orders have been granted after the filing of the claim (particularly any orders granted at the trial itself) which have any relation to the award or to the judgment, the party obtaining these orders must not only see that they are entered in the clerk's office at Albany (see Rule 25) but he must also insert descriptive recitals of these orders in the proposed judgment which he is required to submit to the clerk pursuant to Rule 21. The most frequent orders of this character are those amending the claim or award (either as to parties or subject matter) or consolidating claims for the purposes of the trial.

Parties are requested to submit their proposed judgments to the clerk's office *without backers* and they are also requested not to fasten the sheets together with any permanent fasteners.

FORM F.

JUDGMENT IN CLAIMS OTHER THAN APPROPRIATION CLAIMS.

STATE OF NEW YORK — COURT OF CLAIMS.

JOHN DOE <i>against</i> THE STATE OF NEW YORK.	}	Claim No.
--	---	----------------

....., attorney for claimant.

....., Deputy Attorney-General, for the State of New York.

This claim for the sum of (\$.....) for the (see note 1*) filed on the day of 191.., and numbered, came on to be heard before this court at a session thereof held in the city of on the day of, 191..

The court having heard the proofs and allegations of the parties and having duly made and filed its findings of fact and conclusions of law, it is (see note 2*)

Ordered and adjudged, That, the above named claimant, recover herein against the State of New York the sum of (\$.....) in full settlement of said claim.

.....,
Clerk of the Court of Claims.

* See the notes on the drafting of judgments in other than appropriation claims which follow this form.

NOTES ON THE DRAFTING OF JUDGMENTS IN CLAIMS OTHER THAN APPROPRIATION CLAIMS.

NOTE 1. Insert here a brief recital showing the nature of the claim and giving the location of the premises affected or the place where the claim accrued.

In all canal claims the judgment must show on its face whether the damage was suffered in connection with the old Erie canal or in connection with the barge canal improvement work. This provision is necessary in order to enable the state comptroller to determine from what canal fund the judgment should be paid.

NOTE 2. Where no proof is offered by the state in opposition to the claim, this paragraph of the judgment should read as follows:

The court having heard the proofs and allegations of the claimant and having determined the legal liability of the state, and the claimant having offered to accept the sum of (\$.....) in full settlement of said claim, and no proof having been offered by the state in opposition thereto, it is

GENERAL NOTE. See the general note giving additional directions which are applicable to judgments in claims other than appropriation claims as well as to judgments in appropriation claims.

If the award gives interest, leave blank spaces in the judgment for the filling in of the interest dates and the amount of interest. The clerk's office will fill in these dates and will compute the interest.

II. Procedure to secure payment of judgments.

(See section 269 of the code of civil procedure.)

A. In claims other than appropriation claims.

The claimant must file in the state comptroller's office at Albany the following papers:

1. The certified copy of the judgment which is served upon him by the clerk of the court of claims pursuant to section 269 of the code of civil procedure.

2. The certificate of no appeal which the claimant must secure from the attorney-general. Obviously, if the state intends to appeal, this certificate will not be issued.

Upon the receipt by the state comptroller of the above papers, or upon application to him, he will send to the claimant blank forms of the following papers which also have to be executed and filed in the state comptroller's office:

3. Waiver of attorney's lien which must be executed by the attorney of record for the claimant.

4. Satisfaction of judgment which must be executed by the claimant.

5. Receipt for payment of the judgment which must be executed by the claimant.

B. In permanent appropriation claims.

In addition to the above papers which claimant must file in the state comptroller's office at Albany, judgments in permanent appropriation claims will not be paid until the attorney-general has filed with the state comptroller "a satisfactory abstract of

title and certificate of search as to incumbrances showing the person demanding such damages to be legally entitled thereto." (See section 269 of the code of civil procedure.) It must also be remembered that "unless otherwise ordered by the court or a judge thereof" (see Rule 21), the clerk of the court of claims is not authorized to enter judgment in permanent appropriation claims until the attorney-general has filed in the clerk's office at Albany "his written approval of title to the property appropriated by the state, including his direction as to the claimant or claimants in whose name judgment should be entered." (See Rule 21.)

CODE references. See Author's Note and Distribution Table — page xxiv.

APPENDIX XX.

STATE OF NEW YORK — COURT OF CLAIMS.

.....,	}	
against		Proposal No. —
STATE OF NEW YORK.		Claim No. —

To the Court of Claims of the State of New York:

The petition of the, respectfully shows:

FIRST.— That your petitioner is a domestic corporation, having its principal office and place of business at * * *.

SECOND.— That on the 6th day of September, 1918, the People of the State of New York, through the Conservation Commission, acting pursuant to Section 59 of the Conservation Law and Chapter 146 of the Laws of 1917, and the acts amendatory and supplemental thereto, appropriated, for public and State park purposes, the following described lands, to wit:

* * * * *

THIRD.— That at the time of the service upon your petitioner of said notice of appropriation your petitioner claimed to have been the sole owner in fee of the lands so appropriated.

FOURTH.— On information and belief, that the examination of the title to said land disclosed certain other persons who have or may have some right, title or interest in and to the lands so appropriated, which persons are named and set forth in the certificate of the Attorney General of the State of New York, dated February 20, 1920, to wit:

* * * * *

FIFTH.— On information and belief, that it was impossible to make personal service of notice of appropriation upon the afore-said mentioned parties, as more fully appears from the letter of the Conservation Commission to the Clerk of the County of,

dated, a true copy of which is hereto attached, marked "A" and made a part of this petition.

SIXTH.— On information and belief, that, pursuant to the provisions of Section 59 of the Conservation Law, said Conservation Commission served said notice of appropriation on the aforementioned parties on September 17, 1919, by recording said notice in the County Clerk's Office in Liber of Deeds, at page

SEVENTH.— That on the 31st day of March, 1920, your petitioner filed with the Court of Claims its claim for the value of the lands described in this petition.

EIGHTH.— That your petitioner is not acquainted with any of the persons named in the Attorney General's certificate, as aforesaid, and as named in paragraph "Fourth" above, and, after due and diligent inquiry your petitioner has been unable to learn the whereabouts of any of them. That the efforts made by your petitioner to locate the whereabouts of said persons and to make personal service upon them within the State of New York, more fully appears from the affidavit of, the sheriff of County, verified on the 24th day of May, 1920, and the affidavit of, verified on the 31st day of May, 1920, hereto attached and marked Exhibits "B" and "C."

NINTH.— That none of the above named persons sought to be made parties to this proceeding have either appeared or filed claims in this matter.

TENTH.— That no other or previous application for the relief asked for herein has been made.

WHEREFORE, your petitioner prays that an order of this court be made, pursuant to the provisions of Section 281a of the Code of Civil Procedure.

(1) Bringing in, as parties to these proceedings, the aforementioned persons, to wit:

* * * * *

(2) Directing the service of said parties with this order by publication thereof in, a newspaper published at, in the County of, once in each

of four successive weeks, and that the mailing of copies thereof be dispensed with.

Dated the 10th day of July, 1920.

.....,

Petitioner.

STATE OF NEW YORK, }
COUNTY OF } ss.:

....., being duly sworn, says that he is the Secretary of the, the petitioner named in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

.....

Subscribed and sworn to before me
this day of, 1920.

.....

Notary Public.

"A."

STATE OF NEW YORK,
CONSERVATION COMMISSION,
ALBANY.

To the Clerk of the County of, State of New York:

DEAR SIR: Inclosed find Notice of Appropriation of Land by the People of the State of New York, to which is attached duplicate description, certificate and endorsement. These papers are to be filed and recorded by you in the books used for recording deeds pursuant to the requirements of Chapter 290 of the Laws of 1919.

The Commission has not been able to serve said notice and papers or cause the same to be served upon, the wife of said,, the wife of said,, the wife of said, and the wife of said, personally within the State, after making an effort so to do, which the Commission deems to

be reasonable and proper, and the Commission hereby serves said notice and papers on these persons by filing same in your office and by causing same to be recorded as above described. You will also index the names of these persons as grantors, in an index book to be kept by you as required by said act.

When this service is completed you will please furnish this Commission with a certified copy of the notice and papers showing the date of the filing and recording thereof and the Book of Deeds and page thereof where recorded, together with a bill for the charges.

Dated, Albany, N. Y.,, 1919.

CONSERVATION COMMISSION,
STATE OF NEW YORK,
By

.....
Commissioner.

“B.”

IN THE MATTER	}
OF	
.....	

STATE OF NEW YORK, }
COUNTY OF } ss.:

....., being first duly sworn, deposes and says that he is the Sheriff of County; that something over three weeks prior to the date of this affidavit, he was requested by the of, to locate the whereabouts of the following named persons, to wit:

* * * * *

With a view to making personal service within the State of New York upon said persons. That this deponent personally, and through his deputies, have made diligent search for, and efforts to locate said persons in the County of where the property involved, to wit,, is situated;

that said lot lies between and in said County of That this deponent and his said deputies, not only went on to the ground in the vicinity of the location of the lot, but inquired personally of elderly residents in that vicinity for the persons above named and their possible whereabouts, and for each and every one of them.

That among other persons from whom this deponent and his deputies sought information, were the following, to wit:, who is about forty-eight years of age and has lived at all his life. He is a man of wide acquaintance and accurate memory and familiar generally with titles of property and owners of property in the vicinity of Lot ... and that entire locality; deponent and his said deputies inquired further, personally, from one, who is about fifty years of age, and has always lived at in near proximity to said Lot ..., and is an attorney-at-law with a wide practice connected with real estate deals in that entire territory; also from, who has been for many years a resident of, and has been actively engaged in politics for a great many years, and in that way has long had a very wide acquaintance with people generally in the vicinity of the location of said lot; also of one,, who is about forty-eight years of age, and has lived at all his life and knows the lot in question, and has a very wide acquaintance in that vicinity.

That none of these people were able to give deponent or his said deputies any information as to the whereabouts, or the possible whereabouts, of any of the persons sought and above named. That this deponent and his said deputies inquired personally of other people, old residents, and any one they could think of who might be able to give the desired information, but without avail. That the deponent and his said deputies inquired of said people because by reason of their age, their wide acquaintance, their familiarity over a period of many years with the locality in question, they would be more likely than others to be able to give the desired information.

Deponent therefore deposes and says that he has been unable to locate the whereabouts of any of the persons named above, after

diligent search and effort, as above recited, and in his judgment it will be impossible to make personal service of any papers on said persons or any of them within the State of New York, because of the inability to locate their whereabouts.

.....

Subscribed and sworn to before me
this day of, 1920.

.....,

Notary Public.

“C.”

IN THE MATTER	}
OF	
.....	

STATE OF NEW YORK, }
COUNTY OF } ss.:

....., being first duly sworn, deposes and says that he is, and for several years has been, an employee of the of, New York; that some weeks ago he was requested by said to locate the whereabouts, if possible, of the following named persons, to wit:
* * * * *

with a view to making personal service of certain papers upon said persons within the State of New York; that this deponent has personally made diligent search for said persons alike in and Counties, and particularly in the vicinity of, and other places in the locality, since the property involved, to wit, a part of said Lot, County, in which said parties are supposed to be interested, is situate not far from

That this deponent has made particular inquiry from old residents in that vicinity, persons who have lived within five or ten

miles of the lot in question all their lives, and who are well acquainted in the northern section of County and the southern section of County. That after travelling through this vicinity and inquiring from a large number of persons, who by reason of their long residence and age this deponent had reason to believe would know the whereabouts of the persons above named, if they resided either in that vicinity or in northern New York, and who would know any relative of said parties, this deponent has been unable to locate the whereabouts of said persons or any of them, or to find any person who knows said parties or any of them, or could give this deponent any idea of where to find said parties or any of them.

That among the parties whom this deponent interviewed, were the following named persons, to wit:, who is a man about fifty years of age, and who is the Postmaster at, only a short distance from the lot in question. That as Postmaster in a small locality, he is naturally familiar with the names of all persons living in the vicinity, and has a wide acquaintance among all persons in the locality. That he has been Postmaster for a number of years and has held different official positions in the town of, and in the County of, and has a wide acquaintance; that he stated to deponent that he neither knew of any of the persons above referred to, nor had he ever heard of their existence, or the existence of any of them.

That this deponent also interviewed, who lives within a few miles of the property in question and is seventy years of age; that he has a very wide acquaintance all through that section of northern New York, and has had for upwards of fifty years; that he stated to this deponent that he did not know any of the parties above referred to and never had known or heard of them or either of them and could give deponent no information as to their whereabouts, or where they might be found.

That deponent further interviewed, who is also an old resident in the vicinity of the property in question and is upwards of seventy years of age, and is unusually informed in regard to persons who have lived, or who have property or business interests, or who have had for the last fifty years in that

vicinity, and who informed this deponent that he could give no idea of where any of the persons named above could be found, or as to their address or who would be likely to be able to give deponent such information.

That deponent made like inquiry of, another resident of that vicinity, upwards of seventy years of age, with a very wide acquaintance.

That this deponent also conferred with one,, who was for many years the Postmaster at, back as far as the first McKinley Administration, and from that time forward for a great many years, and as such Postmaster was familiar with all persons getting mail through the post-office, and persons living anywhere in that vicinity, and in general had an extended personal acquaintance all through that region. That said was unable to give this deponent any information as to the whereabouts of any of the parties above named, or from whom he could learn the whereabouts of any of them.

That this deponent interviewed many other persons who he had reason to believe would know the whereabouts of said parties if they were to be found anywhere in the State of New York, but without obtaining any information.

That by reason of the foregoing, this deponent makes oath that to the best of his knowledge, information and belief, after honest and earnest effort made to locate the whereabouts of said parties, that it is and will be impossible to make personal service on them or either of them within the State of New York for the reason that they cannot be located.

Subscribed and sworn to before me

this day of, 1920.

.,

Notary Public.

APPENDIX XXI.

STATE OF NEW YORK — COURT OF CLAIMS.

<p>.....,</p> <p style="text-align: center;"><i>against</i></p> <p>STATE OF NEW YORK.</p>	}	<p>Proposal No. —</p> <p>Claim No. —</p>
---	---	--

Upon reading and filing the petition of the, a domestic corporation, duly verified on the day of, 1920, and the claim of said for the value of land permanently appropriated by the State of New York for public and State park purposes, pursuant to the statute in such case made and provided, described as follows:

* * * * * * * * * *

and it appearing to the satisfaction of the undersigned, one of the Judges of the Court of Claims of the State of New York, that the persons hereinafter mentioned and described, have, or may have, some right, title or interest in and to the above described land, and that none of them have appeared or filed claims in this controversy, and that such persons are necessary parties for a complete determination of this controversy;

And it further appearing to the satisfaction of the undersigned that the said has made proper and diligent effort to ascertain the whereabouts of said persons without success, and that said persons and their places of residence are unknown to said, so that personal service of this order cannot be made upon them, and that the said cannot with reasonable diligence ascertain the place or places where the said persons would probably receive matter transmitted through the Post Office;

Now ON MOTION of, Esq., attorney for said, the Attorney-General, by Hon.....,

Deputy Attorney-General, appearing and not objecting; it is
ORDERED, that

* * * * * * * * *

be, and they hereby are made parties to this proceeding, and hereby are directed to file their claims, if they see fit so to do, within three months as provided by subdivision 4 of Section 59 of the Conservation Law; and it is further

ORDERED, that service of this order upon the persons above named and described, be made by publication thereof in, a newspaper published at, in the County of, New York, the county wherein said land is located, once in each week for four (4) successive weeks, and that the mailing of copies of this order is hereby dispensed with.

Dated, 1920.

.....
Judge of the Court of Claims.

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APPENDIX XXII.

Objection No.....

GENERAL RELEASE (CLAIMS)

WHEREAS, certain lands situate in the County of....., State of New York, have been appropriated by the State of New York for Barge Canal purposes, which said lands are shown on appropriation Map.. No., now on file in the office of the Clerk of said County, and,

WHEREAS, the title to said lands at the time of said appropriation was claimed by and,

WHEREAS, ha.... filed a claim for the award for said lands in the Court of Claims, numbered, and

WHEREAS, the undersigned ha...., or may have, some right, title or interest in and to said lands, and a claim on account of the appropriation thereof, to wit
(State nature of interest released)

and is willing to relinquish the same in favor of the said.....
..... Now, therefore,

IN CONSIDERATION OF THESE PRESENTS and the sum of..... dollars (\$.....) to the undersigned in hand paid, the receipt of which is hereby acknowledged, the undersigned hereby assign.., transfer.., and set.. over to the said personal representative and assigns, all right, title and interest in and to said lands and any claim, award and judgment, on account of the appropriation thereof, and in and to every matter and thing in any wise related to the said land so appropriated, to the end that the said

may receive from the State of New York the full amount of said claim and any award and judgment on account thereof; hereby remising, releasing and forever quit-claiming unto the said claimant, all right, title and interest, if any, in and to said land, and in and to the claim, award and judgment, as aforesaid.

IN WITNESS WHEREOF, the undersigned, ha. . . . hereto set. . . . hand.. and seal.. this day of 191..

In presence of

..... (L. s.)

..... (L. s.)

STATE OF NEW YORK, }
COUNTY OF } ss.:

On this day of 191.., before me personally came to me known to be the individual.. described in and who executed the foregoing instrument, and acknowledged to me that...he... executed the same.

.....

Notary Public

APPENDIX XXIII.

GENERAL RELEASE

(Appropriation of Forest Lands)

Proposal No.

Objection No.

WHEREAS, certain lands situate in the County of, State of New York, have been appropriated by the State of New York for State and public park purposes, which said lands are described as follows:

..... and,

WHEREAS, the title to said lands at the time of said appropriation was claimed by

..... and,

WHEREAS, ha... filed a claim for the award for said lands in the Court of Claims, numbered, and

WHEREAS, the undersigned ha..., or may have, some right, title or interest in and to said lands and a claim on account of the appropriation thereof, to wit
(State nature of interest released)

and is willing to relinquish the same in favor of the said.....
....., Now, therefore,

IN CONSIDERATION OF THESE PRESENTS and the sum of
..... dollars (\$.....)
to the undersigned in hand paid, the receipt of which is hereby acknowledged, the undersigned hereby assign., transfer., and set.. over to the said
personal representatives and assigns all right, title and interest in and to said lands and any claim, award and judgment, on account of the appropriation thereof, and in and to every matter and thing in any wise related to the said land so appropriated, to the end that the said

See pages 413, 453.

..... may receive from the State of New York the full amount of said claim and any award and judgment on account thereof, hereby remising, releasing and forever quit-claiming unto the said, all right, title and interest, if any, in and to said land, and in and to the claim, award and judgment, as aforesaid.

IN WITNESS WHEREOF, the undersigned, ha.... hereto set.... hand.. and seal.. this day of, 192...

In presence of

..... (L. s.)
 (L. s.)

STATE OF NEW YORK, }
 COUNTY OF } ss.:

On this day of, 192..., before me personally came to me known to be the individual.. described in and who executed the foregoing instrument, and acknowledged to me that....he.... executed the same.

.....
Notary Public

APPENDIX XXIV.

ORDER FOR JUDGMENT

STATE OF NEW YORK — COURT OF CLAIMS

.....

Claimant

against

THE STATE OF NEW YORK.

The above claim for \$..... having been brought on for trial at a session of this court held at on, and claimant having appeared by Attorney and the State having appeared by Deputy Attorney-General, and the claimant having made proof in support of said claim, and the Attorney-General having offered no proof and made no opposition to an award herein as hereinafter provided, and claimant having offered to accept the sum of with interest on the sum of \$..... from the day of, 19 , in full satisfaction of said claim, and the Attorney-General having presented and filed the written consent of the Superintendent of Public Works to the compromise of said claim for the sum of with interest on the sum of \$..... from the day of, 19 , it is

ORDERED, that the clerk enter judgment herein in favor of the claimant for the sum of with interest on the sum of from the day of, 19 , in full satisfaction of said claim.

.....
Dated

.....
.....
Judges of the Court of Claims

See page 422.

APPENDIX XXV.

THIS INDENTURE, made and executed this day of
., 1917, by the undersigned, GUARANTY TRUST COMPANY
OF NEW YORK, as Trustee, WITNESSETH :

WHEREAS, pursuant to the provisions of a certain mortgage and deed of trust, made by the Niagara, Lockport & Ontario Power Company to The Standard Trust Company of New York, as Trustee, bearing date November 30, 1904, and a certain supplemental mortgage and deed of trust, made by the said Niagara, Lockport & Ontario Power Company to the Standard Trust Company of New York, as Trustee, bearing date February 28th, 1906, the mortgage and deed of trust being recorded in Niagara County Clerk's Office January 3rd, 1905, in Liber 296 of Mortgages, at page 379, and the supplemental mortgage and deed of trust recorded in Niagara County Clerk's Office March 26th, 1906, in Liber 306 of Mortgages, at page 498, power and authority was given to the Trustee, upon request of said Niagara, Lockport & Ontario Power Company, to release from the lien of said mortgage and supplemental mortgage portions of the mortgaged premises covered thereby; and

WHEREAS, The Standard Trust Company of New York has been merged with the Guaranty Trust Company of New York, pursuant to Section 36 of Article 2 of Chapter 10 of the Laws of 1909, and said Companies having taken the name of Guaranty Trust Company of New York; and

WHEREAS, the State of New York, on or about November 1st, 1909, appropriated the lands hereinafter described for Barge Canal purposes, which are the premises shown on appropriation map No. 1857, on Contract No. 40; and on or about October 10th, 1910, the Niagara, Lockport & Ontario Power Company filed a claim against the State of New York in the Court of Claims for the appropriation of said lands, being Claim No. 10176; said claim was tried in the Court of Claims in the City of Rochester on the 3rd day of October, 1916, and said Court made an award

for the appropriation of said lands in favor of the Niagara, Lockport & Ontario Power Company and against the State of New York in the sum of \$103.94; and

WHEREAS, said Niagara, Lockport & Ontario Power Company has requested the Trustee, in accordance with the mortgage and supplemental mortgage to release the premises hereinafter described and the award made by reason of the appropriation thereof;

NOW THEREFORE, in consideration of these presents and of the sum of One and more dollars, paid to Guaranty Trust Company of New York, Trustee, receipt whereof is hereby acknowledged and in consideration of the payment by the State to said Niagara, Lockport & Ontario Power Company of said sum of \$103.94 and interest, the said Guaranty Trust Company of New York, Trustee, hereby assigns, transfers and sets over to the Niagara, Lockport & Ontario Power Company, its successors and assigns, all right, title and interest in and to the following described lands:

(Insert description)

and in and to any claim, award and judgment on account of the appropriation thereof, and in and to every matter and thing in any wise related to the said land, so appropriated, to the end that said Niagara, Lockport & Ontario Power Company may receive from the State of New York the full amount of said claim and any award and judgment on account thereof; hereby remising, releasing and forever quit-claiming unto the said Niagara, Lockport & Ontario Power Company all right, title and interest, if any, in and to said land, and in and to the claim, award and judgment, as aforesaid; retaining and holding the remainder of said mortgaged premises as security for the payment of said mortgage, supplemental mortgage and deed of trust, with the intent that the lands hereby conveyed and any award and judgment on account of the appropriation thereof may be discharged from said mortgage, supplemental mortgage and deed of trust.

IN WITNESS WHEREOF, the Guaranty Trust Company of New York has caused its corporate seal to be hereunto affixed and its

corporate signature to be hereunto subscribed at the hands of
its, the day and year first above written.

GUARANTY TRUST COMPANY OF NEW YORK,
By

ATTEST:

.....

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of, 1917, before me personally
came, to me known, who, being by me duly
sworn did depose and say that he resides in;
that he is the of GUARANTY TRUST COM-
PANY OF NEW YORK, the corporation described in and which exe-
cuted the above instrument; that he knows the seal of said cor-
poration; that the seal affixed to said Instrument is such corporate
seal; that it was so affixed by order of the Board of Directors of
said corporation and that he signed his name thereto by like order.

.....
.....

APPENDIX XXVI.

AGREEMENT IN RE APPROPRIATED LANDS

Contract No.

Map No.

WHEREAS, the lands, structures and waters bounded and described in the annexed map, have been appropriated for canal purposes according to the provisions of Chapter of the Laws of, as amended:

Now, THEREFORE, we, the undersigned

 whose postoffice address is

County of, New York, owner, and the SPECIAL EXAMINER AND APPRAISER, have agreed and determined that the value of the property so appropriated free and clear from any and all liens or encumbrances, and the damages sustained by such owner by reason of such taking and appropriation, is the sum of (\$.....), which sum the said owner agrees to accept in full settlement of and for any and all claims and demands whatsoever against the State which he or his assigns or successors in interest may or might have by reason of such taking and appropriation, which amount the Special Examiner and Appraiser agrees shall be paid to said owner, or his assigns or successors in interest, in the manner and at the time hereinafter stated:

IT IS FURTHER MUTUALLY AGREED, that this contract shall be presented to the Superintendent of Public Works for his approval, and if approved by him and also by the Canal Board, the said owner or his assigns or successors in interest will execute and deliver to the People of the State of New York a release or releases of all claims and damages growing out of or arising from such appropriation, which said release shall be signed by the owner and his wife, if any, and shall be duly acknowledged.

IT IS FURTHER MUTUALLY AGREED, that if this contract is approved by the Superintendent of Public Works and the Canal Board, and if the Attorney-General of the State of New York approves of the form and sufficiency of the release or releases given and delivered as provided for above, and of the owner's title to

said premises, and certifies his approval of such release or releases and title to the Canal Board, then and in that event, the said owner or his assigns or successors in interest shall be entitled to receive from the State the sum of (\$.....) with interest thereon as provided for by the act first above mentioned.

IT IS FURTHER AGREED, that if the release and title, or either, are not satisfactory to the Attorney-General, the said owner will furnish forthwith upon demand which may be given personally or by letter to him at his postoffice address as above, any and all chains of title, certificates, affidavits, conveyances, releases or other instruments, except searches, which may be necessary to remedy and correct the defects complained of, and upon failure promptly so to do, interest shall cease for the period of such delay.

IT IS FURTHER AGREED, that if the release and title to said premises and appurtenances, or either, are finally not satisfactory to the Attorney-General, the said release shall be returned to the owner and this contract shall be null and void.

Witness
.....
to Owner's Signature.
.....
WITNESS our hands and seals this day of
....., 191..

.....(L. s.) Owner

.....(L. s.) Owner

.....(L. s.) Owner

.....(L. s.) Owner

.....(L. s.) Owner

.....(L. s.)

Special Examiner and Appraiser.

Witness as to signature of

.....

Approved, 191...

.....

Superintendent of Public Works.

Agreement approved by resolution of Canal Board adopted

....., 191...

.....

Secretary.

APPENDIX XXVII.

Proposal No. 51

IN THE MATTER OF THE APPROPRIATION

OF

REAL PROPERTY

BY

THE PEOPLE OF THE STATE OF NEW YORK.

Warren County,
Palmer's Purchase,
Rear Division,
Lot 13.

WHEREAS the People of the State of New York pursuant to Section 59 of Conservation Law and Chapter 146, Laws of 1917, did on the 10th day of March, 1919, appropriate land and real property in Adirondack Park, Warren County, New York, described as follows:

Palmer's Purchase,
Rear Division,
Lot 13,

So much as is in the Town of Stony
Creek — the parcel supposed to contain
600 acres, be the same more or less;

WHEREAS, Conservation Commission, State of New York, caused a duplicate description of the land so appropriated duly certified with the statutory notice of appropriation endorsed thereon, together with notice of the date of filing thereof in the office of the Secretary of State, New York, to be personally served on on the 10th day of March, 1918.

The undersigned,, does hereby agree that his claim for the value of the property appropriated and for legal damages caused thereby may be adjusted by Conservation Commission at the amount of \$20,541.48; and that the Conservation

Commission duly certify to the Comptroller stating the amount due to me, for which I agree to receipt and voucher in duplicate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of May, 1919.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

On this 20th day of May, 1919, before me, the subscriber, personally appeared, to me known and known to me to be the person named in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

.....
Notary Public.

RESOLUTION BY CONSERVATION COMMISSION.

Proposal No. 51.

WHEREAS, on the 10th day of March, 1919, the People of the State of New York, pursuant to Chapter 146, Laws of 1917, and Section 59 of Conservation Law, duly appropriated the following described land in the Adirondack Park, to wit:

Warren County,
Palmer's Purchase,
Rear Division,
Lot 13, so much as is in the Town of
Stony Creek—the parcel supposed to contain 600 acres, be the same more or less;

and

WHEREAS, on the 20th day of May, 1919,, as owner, executed his consent in writing, duly acknowledged, that the Conservation Commission adjust his claim for the value of the property appropriated and for the legal damages caused thereby at the sum of \$20,541.48 and certify the same to the Comptroller as the amount due him therefor, and

WHEREAS, the Attorney General has certified the title of the land so appropriated to be in the said

RESOLVED, that the Conservation Commission, subject to the consent of the Commissioners of the Land Office, does hereby adjust the claim of the said for the value of said property appropriated and for his legal damages caused thereby, at the sum of \$20,541.48, and that the said sum be certified to the Comptroller as the amount due and to be paid to the said on account of such appropriation, which adjustment is based upon the following facts:

REPORT OF CONSERVATION COMMISSION

Proposal No. 51.

Commissioners of the Land Office,
Albany, N. Y.

Gentlemen:

On March 7, 1918, you advised and consented to the appropriation of the following described land,

Warren County,
Palmer's Purchase,
Rear Division,
Lot 13, so much as is in the town of Stony
Creek — the parcel supposed to
contain 600 acres, be the same
more or less;

which consent was duly filed in the office of the Clerk of Warren County on April 4, 1918.

On May 20, 1919, after the said parcel had been surveyed and found to contain 555.95 acres,, as owner executed his consent in writing, duly acknowledged, that the Conservation Commission adjust his claim for the value of the property appropriated and for his legal damages caused thereby at the sum of \$20,541.48 and certify the same to the Comptroller as the amount due him therefor.

On May 20, 1919, the Attorney General certified the title to said land so appropriated to be in the said

On May, 1919, the Conservation Commission duly adjusted said claim of at \$20,541.48, subject to the consent of the Commissioners of the Land Office, which adjustment was based upon the following facts:

(*State facts.*)

The Conservation Commission, therefore, respectfully requests that the Commissioners of the Land Office, pursuant to Chapter 569, Laws of 1916, and Chapter 146, Laws of 1917, as amended, consent to the adjustment of the said claim of on account of such appropriation at \$20,541.48 and to the certification of said amount to the Comptroller for payment; and that they approve a voucher therefor.

Yours truly,

.....

RESOLUTION OF THE COMMISSIONERS OF THE LAND OFFICE.

RESOLVED, That upon the report of the Conservation Commission to us, dated May, 1919, consent is hereby given, pursuant to Chapter 569, Laws of 1916, and Chapter 146, Laws of 1917, as amended, to the adjustment of the claim of at \$20,541.48, on account of the appropriation of the land described in said report and to the certification of such amount by the Conservation Commission to the Comptroller for payment; and that a voucher be approved therefor.

CERTIFICATE FOR VOUCHER.

STATE OF NEW YORK.

COMMISSIONERS OF THE LAND OFFICE.

The adjustment of the claim of at the sum of \$20,541.48, on account of the appropriation of the land described in this voucher, was approved by resolution of the Commissioners of the Land Office at a meeting thereof held the day of June, 1919, and such resolution was entered in the minutes of said Commissioners of the Land Office.

Albany, N. Y., June, 1919.

.....

Secretary, Commissioners of the Land Office.

CERTIFICATE BY CONSERVATION COMMISSION.

PROPOSAL No. 51.

Hon. EUGENE M. TRAVIS,

Comptroller of the State of New York.

WHEREAS, on the 10th day of March, 1919, the People of the State of New York, pursuant to Chapter 146, Laws of 1917, and Section 59 of Conservation Law, duly appropriated the following described land in the Adirondack Park, to wit:

Warren County,
Palmer's Purchase,
Rear Division,
Lot 13, so much as is in the Town of
Stony Creek — the parcel supposed to contain 600 acres, be the same more or less; and

WHEREAS, on the 20th day of May, 1919,, as owner, executed his consent in writing, duly acknowledged, that the Conservation Commission adjust his claim for the value of the property appropriated and for his legal damages caused thereby at the sum of \$20,541.48 and certify the same to the Comptroller as the amount due him therefor; and

WHEREAS, the Attorney General has certified the title of the land so appropriated to be in the said; and

WHEREAS, the Conservation Commission did on the day of May, 1919, adjust the claim of the said for the value of the said property appropriated and for his legal damages caused thereby at the sum of \$20,541.48; and

WHEREAS, the Commissioners of the Land Office on the day of, 19.., pursuant to Chapter 569, Laws of 1916, and Chapter 146, Laws of 1917, as amended, duly consented to the adjustment of the said claim at the said sum of \$20,541.48 and to the certification of said amount to the Comptroller for payment, and have approved a voucher therefor;

The Conservation Commission hereby certifies the amount due and to be paid to the said on account of such appropriation to be the sum of \$20,541.48.

IN WITNESS WHEREOF, the Conservation Commission has caused its official seal to be hereunto affixed, and ~~these~~ presents to be signed by its Commissioner and attested by its Secretary this day of June, 1919.

CONSERVATION COMMISSION,
NEW YORK.

ATTEST:

.....,

Commissioner.

.....,

Secretary.

APPENDIX XXVIII.

AGREEMENT IN REFERENCE TO THE SALE OF
FOREST LANDS TO THE STATE OF NEW YORK.

(Chapter 569, Laws of 1916, and Chapter 146, Laws of 1917,
as amended.)

PROPOSAL No.

WHEREAS, the undersigned is the owner of certain lands hereinafter described and has offered the same for sale to the People of the State of New York, through the Conservation Commission, for State park purposes, and

WHEREAS, said Conservation Commission has made a physical examination of said lands and of the timber thereon and has offered the undersigned the price of \$..... per acre,

NOW THEREFORE, the undersigned, whose post-office address is, County of, N. Y., owner, hereby agrees to sell and convey, by warranty deed, free and clear from any and all liens and incumbrances, to the People of the State of New York, said lands hereinafter described for the sum of \$..... per acre. Said deed to be delivered when the undersigned is notified by letter, from the Attorney General, directed to the undersigned at the aforesaid address, demanding said deed.

IT IS FURTHER AGREED that this agreement shall be subject to the approval of the Commissioners of the Land Office as to purchase, and subject to the approval of the Attorney General as to title, and of the Comptroller as to description and area.

It is understood that the title to the lands hereby offered for sale is subject to examination and approval by the Attorney General, and that the undersigned will cooperate with the Attorney General and submit to him all title papers which he has, and obtain and furnish additional information and papers whenever required by the Attorney General, including affidavits, conveyances and

releases. If the undersigned has no search or abstract of title of said lands, same is to be procured by the State.

IT IS FURTHER AGREED that if this agreement is not approved by the Commissioners of the Land Office, or if the title to said lands is not approved by the Attorney General, or if the description and area is not approved by the Comptroller, this agreement shall be null and void.

IT IS FURTHER AGREED that the undersigned will pay and discharge all taxes and assessments against said lands to the time of the recording of the conveyance thereof to the State and that no interest on the purchase money here expressed shall be allowed to the undersigned on the consideration herein expressed.

The lands herein referred to are described as follows:

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal this day of, 191..

WITNESS:

..... L. S.

Owner.

..... L. S.

Owner.

.....

Conservation Commissioner.

STATE OF NEW YORK,)
COUNTY OF } ss.:

On this day of, 191.., before me personally came to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

.....

.....

* * * * *

The purchase of the land herein described at the price therein stated was approved by resolution of the Commissioners of the

Land Office at a meeting thereof held the day of
....., 191.., and such resolution was entered in the
minutes of said Commissioners of the Land Office.

ALBANY, N. Y.,

.....,
Secretary, Commissioners of the Land Office.

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